# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

## No. 340.

INTERNATIONAL RAILWAY COMPANY, APPELLANT,

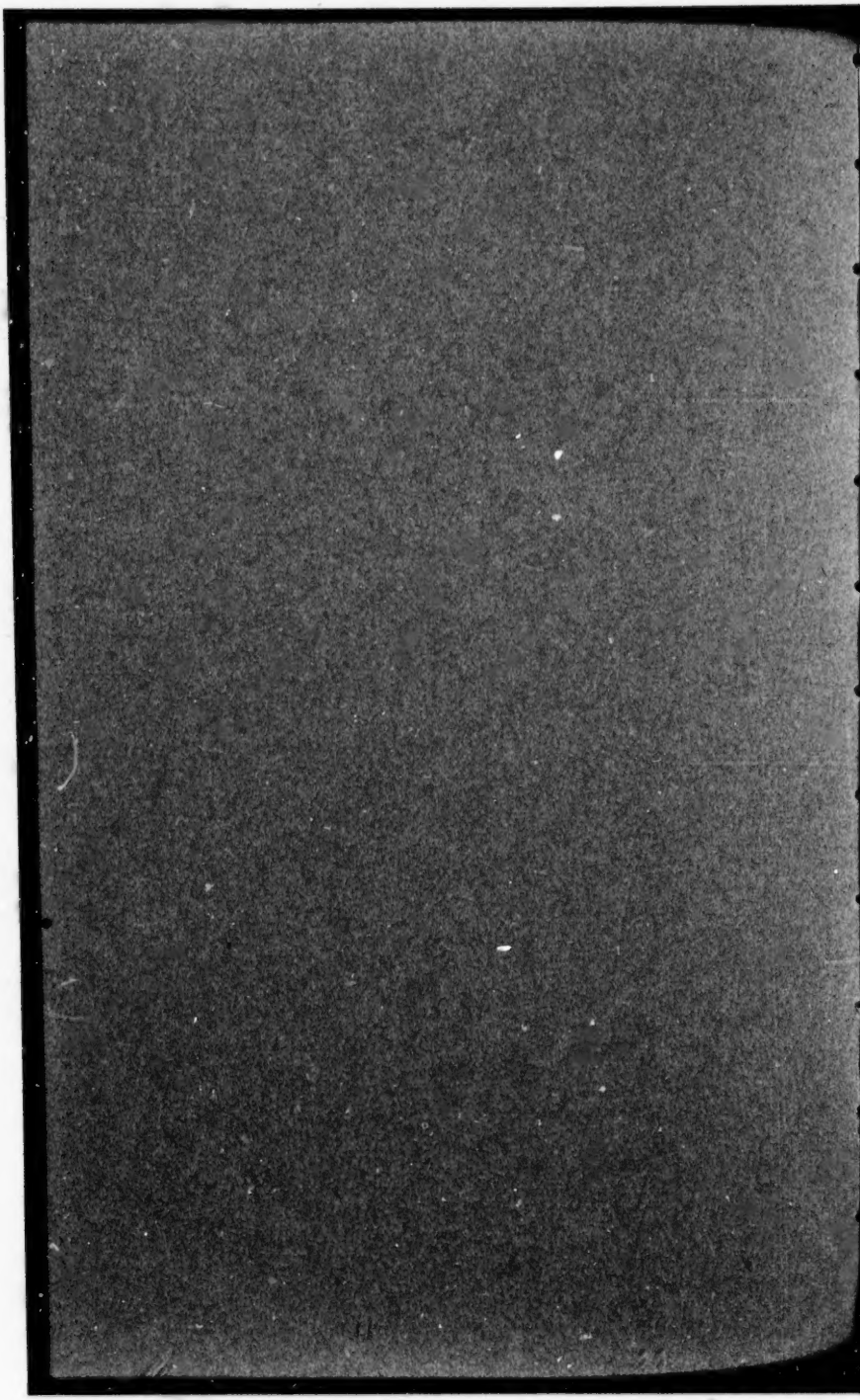
vs.

GEORGE G. DAVIDSON, INDIVIDUALLY AND AS COLLECTOR OF THE PORT OF BUFFALO, ET AL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED JUNE 3, 1921.

(28,295)



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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 17, 1921.

1 United States Circuit Court of Appeals for the Second Circuit.

In Equity.

No. 312-B.

INTERNATIONAL RAILWAY COMPANY, Appellant (Complainant Below),

against

GEORGE G. DAVIDSON, Individually and as Collector of Customs of the Port of Buffalo; John Doe and Richard Roe, Whose Names Are Unknown to This Complainant, It Being Thereby Intended to Indicate and Designate the Officers, Agents, Deputies, Under-collectors and Employees of the said George G. Davidson as Collector of Customs of the Port of Buffalo, of the City of Buffalo, Respondents (Defendants Below).

*Citation.*

UNITED STATES OF AMERICA, *ss:*

2 To George G. Davidson, individually and as Collector of Customs of the Port of Buffalo; John Doe and Richard Roe, whose names are unknown to the complainant, it being thereby intended to indicate and designate the officers, agents, deputies, under-collectors and employees of the said George G. Davidson, as Collector of Customs of the Port of Buffalo, of the City of Buffalo, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals, Second Circuit, to be holden at New York City, within thirty days from the date hereof, pursuant to an appeal filed in the Clerk's Office of the United States District Court for the Western District of New York, wherein International Railway Company is appellant and you are the defendants respondent, to show cause, if any there be, why the judgment mentioned in the said appeal as allowed should not be corrected, and speedy justice should not be done to the parties on that behalf.

Witness the Honorable John R. Hazel, United States Judge, this 17th day of January in the year of Our Lord one thousand nine hundred and twenty-one.

JOHN R. HAZEL,
*United States Judge.*

3 *Petition and Order for Appeal.*

District Court of the United States for the Western District of New York.

INTERNATIONAL RAILWAY COMPANY, Complainant-Appellant,

against

GEORGE G. DAVIDSON, JR., Individually and as Collector of Customs, etc., et al., Defendants-Respondent.

The above named complainant, International Railway Company, conceiving itself aggrieved by the order entered January 4, 1921, in the above entitled proceeding, doth hereby appeal from said order to the Circuit Court of Appeals of the United States, Second Circuit, and prays that its appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said order was made, duly authenticated, may be sent to the said Circuit Court of Appeals.

Niagara Falls, New York, January 12, 1921.

COHN, CHORMANN & FRANCHOT,
*Attorneys for Complainant and Appellant Inter. Ry. Co.*

Nos. 430-443 Gluck Bldg., Niagara Falls, N. Y.

And now, to-wit, on January 13, 1921, it is ordered that the appeal be allowed as prayed for.

JOHN R. HAZEL,
*United States Judge.*

4 *Final Order and Decree.*

At a Stated Term of the United States District Court for the Western District of New York Held at Buffalo, New York, January 4th, 1920.

Present: Honorable John R. Hazel, United States Judge.

District Court of the United States for the Western District of New York.

INTERNATIONAL RAILWAY COMPANY, Complainant-Appellant,

against

GEORGE G. DAVIDSON, JR., Individually and as Collector of Customs, etc., et al., Defendants-Respondent.

The complainant having, on December 4, 1920, filed in this court its bill in equity herein, together with supporting affidavits, and an order having been granted and entered herein on said day directed

to the defendants, to show cause before this court on the 10th day of December, 1920, why a writ of injunction should not issue herein against the defendants, restraining them as prayed for in the complaint, and, pending the hearing of said motion, restraining the defendants as prayed for in said bill, and by stipulation dated
5 December 9, 1920, and filed with this court said motion having been adjourned until December 21, 1920, and the said temporary restraining order having been continued and effective until the decision of the motion for a writ of injunction, and said motion coming on to be heard, and after hearing Basil Robillard, Esq., of counsel for the plaintiff, in favor of said writ of injunction and John T. Walsh, Esq., Assistant District Attorney, opposed,

Now, upon reading the said bill in equity, verified December 4, 1920, and the affidavit of Edgar J. Dickson, verified on said day, and the affidavit of Basil Robillard verified December 3, 1920, and the affidavit of C. A. Chavel, verified December 20, 1920, and the affidavit of Basil Robillard, verified December 20, 1920, presented in favor of said motion, for an injunction, and the affidavit of George G. Davidson, Jr., verified December 20, 1920, in opposition to said motion, and the counsel for the respective parties to this proceeding having made and filed a stipulation of facts dated January 3, 1921, and having stipulated in open court that the court may make a final order and decree in this proceeding without further proof, and it appearing that the complainant-appellant consents to give the undertaking of a surety company in the sum of $5,000.00 conditioned that the complainant will pay the defendants' costs of said appeal or appeals if the final decree shall be finally affirmed and will pay, in such event, to the Collector of Customs the salaries at over-time rate for Sundays and holidays since the commence-
6 ment of this action of said inspectors of customs employed upon said bridges, it is hereby

Ordered, adjudged and decreed that said motion for a writ of injunction herein be and the same hereby is denied, and it is further

Ordered, adjudged and decreed that the bill herein, heretofore filed, be dismissed for lack of equity, and it is further

Ordered, adjudged and decreed that the restraining order heretofore granted as aforesaid be and hereby is continued pending the entry of the final order upon the appeal herein, and pending any further appeal herefrom provided the complainant shall within five days file with the clerk of this court an undertaking of a surety company in the sum of five thousand dollars ($5,000.00) that if the said final decree shall be finally affimed the plaintiff will pay the defendants their costs of said appeal or appeals and will pay in such event, to the Collector of Customs, the defendant, the salaries at over-time rate for Sundays and holidays of the inspectors of customs employed upon said bridges, from the date of the commencement of this action to the date of such payment.

Enter:

JOHN R. HAZEL,
*United States Judge.*

7 *Assignment of Errors.*

And now comes International Railway Company, plaintiff-in-error, and makes and files this, its assignment of error:

1. The District Court of the United States for the Western District of New York erred in refusing to grant a temporary injunction as prayed for the reason that the threatened actions of the defendants below were illegal, ultra vires, and would work an irreparable injury to the plaintiff-in-error and to the traveling public, which could not be compensated in damages, and for which the plaintiff-in-error has no adequate remedy at law.

2. The said District Court erred in refusing to grant a permanent injunction, for the reason that it conclusively appeared upon the affidavits submitted that the threatened actions of the defendants below were illegal, ultra vires, and would work an irreparable injury to the plaintiff-in-error and to the traveling public, which could not be compensated in damages, and for which the plaintiff-in-error has no adequate remedy at law.

3. The said District Court erred in vacating the temporary restraining order theretofore granted, for the reason that it conclusively appeared from the affidavits submitted and uncontradicted that the threatened actions of the defendant below were illegal, ultra vires, and would work an irreparable injury to the plaintiff-in-error and to the traveling public, which could not be compensated in
8 damages, and for which the plaintiff-in-error has no adequate remedy at law.

4. The said District Court erred in dismissing the bill of complaint herein for lack of equity, for the reason that from the undisputed and stipulated facts it appeared that the defendants-in-error threatened unlawfully and without authority to interfere with the business of the plaintiff-in-error and the free and fair traffic of persons across the toll bridges, and threatened to stop said traffic, or a portion thereof, unlawfully and without authority, and threatened to warn persons intending to use said toll bridges that traffic thereon from Canada to the United States would not be permitted,—all contrary to the laws of the United States of America, and to the rights of this plaintiff in and upon its toll bridges; and that said injury to the plainiff-in-error would be irreparable and not compensable in damages, and that plaintiff-in-error had no adequate remedy in law therefor.

5. Said District Court erred in dismissing said bill of complaint for lack of equity for the reason that the threatened actions of the defendants-in-error were contrary to the laws of the United States of America, and to the authority of the defendants-in-error thereunder; that said threatened action would work irreparable damage to the plaintiff-in-error, not compensable by money damages, and that plaintiff-in-error has no adequate remedy at law.

9 6. The said District Court erred in finally dismissing the bill of complaint of the plaintiff-in-error for lack of equity, for the reason that upon the stipulation of facts and the bill of complaint, and the affidavits submitted, it was undisputed that traffic upon said toll bridges of the plaintiff-in-error had continued since the opening of the bridges prior to 1900, on Sundays and holidays, as well as on other days, down to the date of the commencement of this action, and that customs inspection had been rendered thereupon on every day, without charge to the plaintiff-in-error, and that the plaintiff-in-error has a vested right and property in and to a continuance of said traffic as well on Sundays and holidays as on other days; that the actions threatened by the defendants-in-error would diminish or destroy said traffic irreparably, without making compensation therefor; and that said threatened acts were illegal and ultra vires, and the threatened damages not compensable in money; and that plaintiff-in-error has no adequate remedy at law.

7. Said District Court erred in finally dismissing said bill of complaint for lack of equity, for the reason that it appears undisputed that the actions of the defendants-in-error purported to be in pursuance and enforcement of a statute, being the act of Congress approved February 7, 1920, amending Sec. 5 of Chapter 46 of the Acts of Congress of 1911, would require plaintiff-in-error to pay the salaries of customs collectors of the Treasury Department of
10 the United States, for services in inspecting the baggage of persons entering the United States over the toll bridges of the plaintiff-in-error on Sundays and holidays, and that said statute, even if enforceable in the manner threatened by the defendants-in-error, is unconstitutional, null and void for the reason that it attempts to take the property of the plaintiff-in-error without due process of law, and to take the private property of the plaintiff-in-error for public use without just compensation, contrary to Article 5 of the amendments to the Constitution of the United States.

8. Said District Court erred in finally dismissing the bill of complaint herein for lack of equity for the reason that the said statute so sought to be enforced by the actions of the defendants-in-error, against which actions an injunction was prayed, does not apply to the toll bridges of the plaintiff-in-error or any toll bridges, but only to conveyances and vehicles.

9. Said District Court erred in finally dismissing said bill of complaint for lack of equity and in refusing said temporary writ of injunction and permanent writ of injunction, for the reason that the defendants-in-error have no power under the statutes of the United States to distrain and impound the baggage of passengers, or to distrain or impound vehicles coming from Canada to the United States in the event that the owner of such vehicle or of such baggage submits the same for immediate inspection by said customs
11 officers, and that the instructions issued by the said Collector of Customs provided for the distraining and impounding of all baggage and of all vehicles with the exception of trolley cars

whether or not immediate inspection thereof was permitted or requested by the owner thereof.

10. Said District Court erred in refusing the said temporary writ of injunction and the said permanent writ of injunction herein upon the affidavits and upon the bill of complaint, for the reasons assigned for its error in dismissing the bill of complaint herein for lack of equity, as set forth in the assignments of errors hereinbefore numbered "4," "5," "6," "7" and "8."

COHN, CHORMANN & FRANCHOT,
*Attorneys for Appellant.*

Office & Postoffice Address, Nos. 430-443 Gluck Bldg., Niagara Falls, New York.

*Statement of Case.*

The parties to this action, by their respective attorneys, with the approval of the United States District Judge by whom the matters herein involved were determined, hereby, pursuant to Rule 77 of the Rules of Practice for the courts of equity of the United States, make and file this statement of the case:

12 1. Plaintiff is a corporation of the State of New York and owns and operates two public toll bridges across the Niagara River and across the boundary between the United States and Canada, one at Niagara Falls, New York, known as the Upper Steel Arch Bridge, and the other at Lewiston, New York, known as the Lewiston-Queenstown Bridge. Defendant George G. Davidson is, and at all times herein mentioned was, the Collector of Customs for the Port of Buffalo; and defendants John Doe and Richard Roe represent the officers, agents, deputies, under-collectors, servants and employees of George G. Davidson as such Collector, and are customs inspectors, appraisers and clerks.

2. Ever since the erection of said bridges, and prior to the year 1900, customs inspection and customs collection have been performed by officers and inspectors of the United States Customs Service for the Treasury Department of the United States, at the American end of each of said bridges, as well on Sundays and holidays as at night time and during the week, and no charge for such service has been made to the owners of said bridges by the Customs Department, and no payment for such service has been made by the said owners of the bridges, either for the salaries of the inspectors engaged in such overtime work, or otherwise, to the Collector of the Port or any other person.

3. The defendant George G. Davidson, Jr., wrote to the plaintiff on June 29, 1920, a letter under Section 5 of the Act of Con-
13 gress of February 7, 1920, amending Section 5 of Chapter 46 of the Acts of Congress of 1911, (being Section 5571 of the Compiled Statutes as amended), as follows:

[SEAL.]

Treasury Department,

Office of the Collector,

United States Customs Service.

Address all communications for this office to the Collector, Collection District No. 9.

Buffalo, N. Y., June 29th, 1920.

Refer to File No. —.

The International Railway Co.,
Niagara Falls, N. Y.

(Lewiston Bridge.)

(Upper Bridge, Niagara Falls.)

SIRS:

Pursuant to the Act of Congress, approved February 7th, 1920, amending Section #5 of the Act of February 13th, 1911, directing the Secretary of the Treasury to fix a reasonable rate of extra compensation for overtime services of Customs Officers performing service between five o'clock in the afternoon and eight o'clock in the morning, also on Sundays and Holidays, when such services are performed in connection with the lading or unlading of cargo, or the lading of cargo or merchandise for transportation in bond or for exportation in bond, or for exportation with benefit of drawback, or in connection with the receiving or delivery of cargo on or from
14 the wharf, or in connection with the unlading, receiving or examination of passenger baggage, the Secretary of the Treasury has fixed the rate of compensation for such extra service as follows:

For service performed between the hours of 5 p. m. and 8 a. m. one half day's pay for each two hours or fraction thereof, but the maximum amount paid to any Customs Inspector in any one night shall not exceed two and one-half days' pay. For services performed on Sundays and holidays the compensation shall be two days' pay In this district the Customs Officers work on eight hour shifts and are assigned by me to work this eight hour shift at various times during the twenty-four hour period, therefore when such officers are not required on account of the demands of your Company to work more than eight hours there will be no extra compensation exacted from you for service performed between the hours of 5 p. m. and 8 a. m. You are, however, requiring on Sundays and Holidays the service of one or more Customs Officers. For this service, beginning July 1st,

1920, you will be required to pay two days' pay for each Sunday or Holiday for every Customs Officer performing service in connection with your Company.

This is a notice to you and you will be governed accordingly.

Bills will be rendered you by this office and I shall expect prompt payment.

Respectfully,

GEO. G. DAVIDSON, JR.,
*Collector of Customs.*

15 4. Upon receiving said letter, complainant refused to pay such over-time charges unless in connection with services rendered in the unlading of cargo, and complainant never applied for any special license or permit to unlade cargo or shipments on Sundays or holidays, or at night, and no such permit or license has been granted, and complainant does not and has not unladed cargo or shipments of freight or otherwise at night or on Sundays or holidays.

5. On November 27, 1920, defendant George G. Davidson, as Collector, sent to complainant the following letter:

[SEAL.]

Treasury Department,

Office of the Collector,

United States Customs Service.

Address all communications for this office to the Collector.

Buffalo, N. Y., Nov. 27th, 1920.

Received Nov. 28, 1920, Vice President.

The International Railway Co.,
Buffalo, N. Y.

Attention of Mr. E. J. Dickson, Vice Pres.

SIR:

Referring to your letter of July 14th, 1920, which was in reply to my letter to you dated June 29th, 1920, advising you that pursuant to the Act of Congress approved February 7th, 1920, amending Section #5 of the Act of February 11th, 1911, you would
16 be required to pay for the services of Customs Officers on Sundays and Holidays in connection with traffic across your bridges at Niagara Falls and Lewiston, in which letter you stated that you did not consider you were liable for overtime pay of our employees and therefore refused to recognize any claim for such pay, I have to advise you that I referred the matter to the Treasury Depart-

ment at Washington and under date of November 18th, 1920, the Honorable Secretary of the Treasury instructed me as follows:

"If the Bridge Companies refuse to pay for the service, no conveyance should be permitted to enter the United States until 8:00 a. m. when the regular working day following a Sunday or Holiday begins."

You are therefore hereby advised that I am this day instructing the Deputy Collector in charge at Niagara Falls to refuse to allow any conveyance to enter the United States across your bridges at Niagara Falls (upper bridge) or at Lewiston, until you have complied strictly with the above mentioned Act—that is, until you have made application for a special license, special license granted by me, and you have filed a bond pursuant to that Act.

These instructions become effective at midnight, December 4th, 1920, when no cars or other conveyances will be allowed to
17 enter the United States until the following Monday morning at 8:00 a. m.

Respectfully,

GEO. G. DAVIDSON, JR.,
*Collector of Customs.*

Copy to: Deputy Collector in Charge, Niagara Falls, N. Y.

6. Said letter was sent for the purpose of enforcing the Act of Congress of February 7, 1920, which amended Section 5 of Chapter 46 of the Act of February 13, 1911.

7. The bridges of the complainant at Niagara Falls and Lewiston are used by many hundreds of people daily on foot and in vehicles, and on Sundays and holidays the use of said bridges is greatly increased. The complainant also operates passenger street cars across said bridges and each of them.

8. On December 4, 1920, complainant filed a bill in equity herein in the District Court of the United States for the Western District of New York, alleging the foregoing facts, and further alleging that the defendant George G. Davidson unlawfully threatened to close both bridges of the complainant from midnight on each Saturday, and on the day before each holiday, until 8.00 o'clock on the following week-day morning, because of complainant's
18 failure to pay the extra over-time compensation of the employees of the Treasury Department engaged in custom inspection at the American end of said bridges; and alleging that if the defendant Davidson was permitted unlawfully to close said bridges, the patronage of complainant's street car lines operated upon the bridges would be greatly decreased because of uncertainty attendant upon transportation; and alleging that complainant would lose profits and income by way of tolls upon the bridges, and fares upon the cars, and that said loss would be immeasurable and not compensable; and alleging that the defendants contemplate the un-

lawful closing of said bridges by force; and alleging that the complainant has no adequate remedy at law.

9. Said bill of complaint prayed for a judgment restraining the defendants and all other persons acting under, through or with them, from closing or attempting to close the said bridges of the complainant on Sundays or holidays, or at any other time, and from interfering with the free and fair passage of persons whether on foot or in vehicles, including trolley cars, across said bridges, except insofar as shall be strictly necessary for inspection and collection of customs duties; and that the defendants be so restrained during the pendency of the action, and that the complainant have such other and further relief as to the court may seem just.

10. At the same time complainant filed in the office of said District Court of the United States for the Western District of
19 New York the affidavit of Edgar J. Dickson, the Vice-President of the complainant, verified December 4, 1920, showing the facts as alleged in the bill of complaint, and setting forth specifically the trolley lines of the complainant operating across said bridges, and that the trolley lines of the Great Gorge Railway Company also operated across said bridges; and also showing that said bridges are used by many persons in Niagara Falls, Ontario, to travel back and forth to Niagara Falls, New York, by foot, in automobiles, and in carriages, and vice versa; and further stating that by closing the bridges as threatened by the Collector, confidence in the continuity of traffic across the bridges, which was an element in their successful operation, would be stopped, and complainant would lose, immediately and irreparably, a large amount of traffic, incomputable and not compensable in damages. Complainant also filed with said bill the affidavit of Basil Robillard, one of its counsel, that on December 3, 1920, at 10.30 o'clock in the morning, in telephone conversation with the defendant Collector, he asked the defendant Collector what was proposed to be done in view of the correspondence between the complainant and the defendant Collector, and that the defendant Collector said that he proposed to close the bridges of the International Railway Company on Saturday night and keep them closed until Monday morning.

11. Upon said bill, which was duly verified, December 4, 1920, and upon the said affidavits, the complainant applied to the
20 United States District Judge at Buffalo, New York, on December 4, 1920, for an order returnable December 10, 1920, directed to the defendants, to show cause why a temporary writ of injunction should not issue against them as prayed for in the complaint, and which order restrained them and all of them, and persons acting under, by or through their instructions or authority, from closing or attempting to close the said bridges of the complainant on Sundays or holidays, or at any other time, and from interfering with the free and fair passage of persons whether on foot or in vehicles, including trolley cars, across said bridges, except insofar as should be strictly necessary for inspection and the col-

lection of customs duties. And said order was duly granted and entered on said date.

12. By stipulation between the complainant by its attorneys, and the defendants by the United States attorney, said return day of said order was adjourned until December 21, 1920, and the temporary restraining order therein granted was continued until the decision of the motion for a writ of injunction.

13. On December 21, 1920, the parties appeared before the said United States District Court for the Western District of New York, by their counsel, as aforesaid, and the defendants presented the affidavits of George G. Davidson, Jr., verified, December 20, 1920, in opposition to said motion, which affidavit showed that defendant Davidson in his official capacity as Collector of Customs duly
21 notified the complainant on July 1, 1920, that unless the complainant would pay two days' pay for each Sunday or holiday for each customs officer performing service in connection with the said company, importation of all merchandise on Sundays and holidays would be stopped, and sent the following instructions to the Deputy Collector at Niagara Falls:

1. Trolleys may come in after full examination.

2. Trolley passengers may come in after surrendering all baggage and effects, to be examined after 8.00 A. M. on the day succeeding each Sunday or holiday.

3. Foot passengers may come in after surrendering all baggage and effects, to be examined after 8.00 A. M. on the day succeeding each Sunday or holiday.

4. All vehicular passengers except trolley passengers may come in after surrendering all baggage and effects, to be examined after 8.00 A. M. on the day succeeding such Sunday or holiday. All such vehicles will not be allowed to enter the United States until after their examination on the day succeeding each Sunday or holiday.

5. All outgoing traffic may proceed as usual.

6. There must be no examination of incoming passengers' baggage, freight or merchandise, no matter how small, including autos, teams and other vehicles except trolleys.

22 7. Any baggage left for examination by Customs officers will be held at owner's risk.

8. You will use all reasonable means to advise all persons leaving the United States by way of bridges that there will be no examination of passengers' baggage and vehicles other than trolley cars until the day succeeding each Sunday or holiday.

9. You will understand that you are not to interfere with passenger traffic but must postpone all examinations until the day succeeding each Sunday or holiday.

19. These instructions are not confidential and may be shown to any interested party, and that such instructions were issued under orders of the United States Treasury Department, and as Collector of Customs;

And further showed that said instructions were issued pursuant to a letter from the Assistant Secretary of the Treasury Department, as follows:

[SEAL.]

Treasury Department,
Washington.

The Collector of Customs, November 18, 1920.
Buffalo, N. Y.

SIR:

The department refers to your letter of July 28th last, in
23 regard to the payment of extra compensation for overtime services of officers examining passengers' baggage on Sundays and holidays under the Act of February 13, 1911, as amended by the Act of February 7, 1920.

You were advised in the department's letter of July 14th, last, that the Act in question is applicable to railroad trains as well as to vessels and that the railroad company is liable for extra compensation for the services of inspectors engaged in the examination of the baggage of passengers on trains arriving after 5.00 P. M. or before 8.00 A. M. even though a specific request for such service is not made. The fact that trains arrive or depart at times other than the regular working hours or on Sundays or holidays contemplates the employment of men for the examination of baggage and merchandise in bond or other service for which extra compensation can be allowed under the Act is in effect a request for the service.

You report that communications were addressed to all railroad and bridge companies in your district informing them that on and after July 1, 1920 extra compensation would be required to be paid by them to inspectors examining baggage or passengers arriving on Sundays and holidays. You state that the International Railway Company and the superintendent of the Niagara Railway Arch Bridge have refused to pay for the Sunday and holiday service taking the position that the amendment of February 7, 1920, does not specify that a carrier or bridge company shall pay for
24 the examination of passengers' baggage and does not specify who shall pay for such service and also that the carrier shall pay for extra compensation only when a special license shall be granted for immediate lading or unlading and that there is nothing in the Act of February 13, 1911 as amended which provides for or requires the issuance of a special permit or license for the examination of passengers' baggage or to lade or unlade on Sundays and holidays.

The Act of February 7, 1920 which amends Section 5 of the Act of February 13, 1911, must of course, be construed in connection with the other sections of the Act of 1911. Section one of the Act of 1911 provides for the unlading at night "of any vessel or other

conveyance from a foreign port or place after due report and entry of such vessel in accordance with existing law, or due report under such regulations as the Secretary of the Treasury may prescribe of the arrival of such other conveyances." Section 5 of the Act of 1911 provided for the payment of extra compensation of customs officers who worked at night or Sundays and holidays when rendering services in connection with the lading or unlading of cargo, or the lading of cargo or merchandise for transportation in bond or for exportation in bond, or for exportation with benefit of drawback and the Act of February 7, 1920 added to the services for which extra compensation could be paid, services in connection with the receiving or delivery of cargo on or from the wharf, or in connection with the unlading, receiving, examination of passengers' baggage.

25 You are, therefore, authorized under the law to collect extra compensation for the services of customs officers who work overtime at night or on Sundays or holidays in the examination of baggage or who perform other services specified under the Act. Inspectors who work in eight hour shifts can be allowed extra compensation only where the night service exceeds by at least one hour the eight hours which inspectors are required to work.

If the bridge companies refuse to pay for the service no conveyance should be permitted to enter the United States until 8 A. M. when the regular working day following a Sunday or holiday begins. If the person arriving with a conveyance desires to pay extra compensation for the examination of baggage or for other service within the Act, such service may be rendered. Otherwise the conveyance should be refused entry.

Foot passengers may be permitted to pass into the United States, as it is not probable that they will have much baggage to examine. In cases where the examination of the baggage of foot passengers would consume too great an amount of time, such baggage can be detained for examination on the following day.

Respectfully,

J. H. MOYLE,
*Assistant Secretary.*

26 By said affidavit, said deponent further said that he had no intention of closing said bridges to traffic on Sundays and holidays, and that he had merely given orders that no baggage would be examined on Sundays whether foot passengers convey it, or fare-paying passengers in the conveyances of the plaintiff company; that common carriers such as street cars would be permitted to proceed to destination after examination; that foot passengers and trolley passengers would be told to enter without baggage; that passengers carrying baggage would have the option of leaving their baggage to be examined after 8:00 o'clock on the following morning, or would have the option of returning to Canada immediately; that automobiles and vehicles, being dutiable merchandise, must be left for examination on the next succeeding day. Said affidavit further showed that there would be a guard employed by the customs service at the American end of the bridge to turn back automobiles, take baggage for deposit,

and turn back passengers who refused to deliver their baggage for examination the next day after 8:00 A. M.; and further showed that the regular working hours of customs inspectors were from 8:00 o'clock in the morning until 5:00 o'clock at night; that the United States had no power to pay customs inspectors for over-time or holidays; that the original acts for such payment applied only to over-time and Sunday service in connection with the unloading of vessels, and that on February 7, 1920, Congress enacted an amendment applying to "other conveyances" besides vessels, in which
27 category the deponent asserted the trolleys of the complainant, and the automobiles crossing bridges, were contained. Said affidavit further showed that if the bridges would accommodate only foot passengers, no customs inspectors would be stationed there by the defendant Davidson; that according to the Act of February 7, 1920, the only way in which such service could be given to the transportation company is by application for special license to unlade passengers' baggage after 5:00 P. M., and until 8:00 A. M., and for the granting of such special license the carrier or consignee must pay the statutory compensation for the inspectors, and that under this ruling automobiles and foot passengers do not come within the excepted class; that is, they cannot apply for special permits for over-time service to be rendered to them because automobiles are themselves merchandise and may turn out to be dutiable, and foot passengers are not conveyances within the meaning of the statute. Said affidavit further showed that if the plaintiff would pay the inspectors for the over-time, Sunday and holiday inspection, the defendant Davidson would instruct his deputy collectors and inspectors to examine and admit the baggage of foot passengers and automobiles and their contents, but that this additional service would be grafuitous and in the nature of a concession, and that the defendant Davidson would put into effect the ruling of the Department on Sunday, December 26, 1920, and Sundays and holidays thereafter, and that defendant Davidson has it in his power to compel the com-
28 plainant to pay time and a half to the inspectors working at the request of the complainant, from 5:00 P. M. to 8:00 A. M., and has the power to exclude baggage and vehicles until 8:00 o'clock A. M. the following day, or to require the deposit of the same unless complainant pays the sum required by law; and that, in the opinion of the defendant Collector, derived from his experience and the experience of his collectors and inspectors, it would consume too much time to examine the baggage of foot passengers, which is the reason for holding up the baggage of foot passengers until 8:00 o'clock the following day, or for turning back the baggae of foot passengers into Canada.

14. In further support of said motion, the complainant presented the affidavit of C. A. Chavel, the auditor of the complainant, verified, December 16, 1920, which showed that said Chavel had supervision of all expenditures of the complainant, and knew of his own knowledge that neither the International Railway Company nor the Niagara Falls Suspension Bridge Company, nor the Lewiston Connecting Bridge Company, nor any subsidiary or associated company

with the complainant, has ever paid to or for Canadian Customs inspectors for the inspection of baggage, any salaries for over-time or Sunday or holiday pay; and the affidavit of Basil Robillard, one of the counsel of the complainant, verified, December 20, 1920, stating the facts as hereinbefore shown, and that a conference between the attorneys for the complainant, and the United States attorney on behalf of the defendants, and the attorneys for another bridge company similarly situated, and the customs officials, had been called at the office of the United States attorney for the purpose of arriving at some settlement of the situation, and that it was stated by Mr. Smith, the inspector who was present, that it was the Customs Department's interpretation of the law that the complainant would be required to apply for a special permit for unlading on Sundays and holidays in order to permit conveyances such as automobiles to enter by the bridge on those days, and for that purpose complainant would be required to make application and give a bond, and that Mr. Smith had presented copy of the instructions hereinbefore set out, issued to the deputy collector at Niagara Falls, and that Mr. Smith had stated for the department that it was the interpretation of the department that under Sec. 5812 of the Compiled Statutes passengers on street cars were obliged to dismount from the street car and present their baggage to a customs officer for examination, and that the customs officer did not have to make the examination when the baggage was presented, although it was presented unlocked, but could keep it for that purpose until the next morning, and that the Customs Department proposed to compel all persons to leave their goods, including their automobiles, in pound at the customs house, until 8:00 o'clock on the next succeeding business day, for examination, whether such goods were dutiable or not; and that it was suggested on behalf of the complainant that the matter of injunction could be eliminated if the Government would sue the complainant to collect the over-time wages of the inspectors, and that said Inspector Smith refused to do so but stated that the Government was not in position to sue, no special license having been requested or granted, and that in any event they preferred not to do so, but preferred to use the method of closing the bridges.

15. Upon these affidavits and the bill of complaint, the complainant asked for a writ of permanent injunction upon the grounds:

(*a*) That the act of the Collector in detaining passengers' baggage was illegal and without his authority.

(*b*) That if the proposed act of the Collector was legal, it was done for the purpose of illegally enforcing against complainant the Act of February 7, 1920, which was not applicable to complainant.

(*c*) That if the Act of February 20, 1920, was applicable to complainant, said Act was unconstitutional and null and void as taking complainant's property without due process of law, and taking complainant's property for public use without compensation.

(*d*) That the matter could be closed by a suit by the Treasury Department to collect the amount of over-time salaries which it claims to be due.

31 (*e*) That the Government not only had power to itself pay the inspectors the over-time salaries, but was compelled to do so.

16. Upon said affidavits and papers the defendants moved for a dismissal of the bill for lack of equity, upon the arguments that:

(*a*) The Collector had the power to prohibit importation of merchandise.

(*b*) The Collector had the power to compel passengers to dismount from trolleys and other vehicles and submit their baggage for inspection.

(*c*) This constituted unlading, and a special permit must be taken out therefor.

(*d*) Inspection on Sundays and holidays was a special service rendered to the complainant bridge company, and such service could be withdrawn unless application for special permit therefor was made as a condition precedent.

(*e*) The Collector had power to forbid any person to enter the United States, carrying merchandise, whether dutiable or not, until the time set for inspection on the next day.

(*f*) The actions of the defendants are in accordance with statute law and departmental ruling, and not subject to restraining order.

(*g*) The history of the statute shows that it was meant to apply to the complainant.

32 (*h*) The customs inspectors are entitled to pay for the service, working as they do seven days a week.

(*i*) The Collector upon the application for special service would gratuitously furnish a night corps of inspectors to inspect vehicles or private persons and pedestrians' baggage.

Upon these affidavits and the arguments of counsel, an order was entered January 4, 1921, dissolving the restraining order theretofore granted, and on January 4, 1921, another order was entered dismissing the bill for lack of equity, with other provisions, a copy of which order is annexed to this record.

Dated, Buffalo, New York, January 13, 1921.

STEPHEN T. LOCKWOOD,
*United States Attorney.*
COHN, CHORMANN & FRANCHOT,
*Attorneys for Complainant.*

The foregoing statement of the case showing how the questions arose and were decided in the District Court, and setting forth the facts essential to a decision of such questions by the Appellate Court, is hereby approved and ordered filed.

Dated, January 17, 1921.

JOHN R. HAZEL,
*United States Judge.*

33 *Undertaking.*

Know all men by these presents, that:

Whereas a final order and decree has been made herein dismissing the bill herein for want of equity, and denying the complainant's motion for a writ of injunction; and

Whereas complainant, feeling itself aggrieved thereby has appealed to the United States Circuit Court of Appeals for the Second Circuit, therefrom, and has applied for a writ of error thereupon from the United States Circuit Court of Appeals for the Second Circuit, and

Whereas said appeal is now pending.

Now, therefore, the undersigned Maryland Casualty Company of Baltimore, Maryland, does hereby undertake to and with the defendants in this action, and their successors, that if said order and decree is finally affirmed upon the appeal or appeals herein taken, or upon the writ or writs of error issued herein, the complainant will pay to the defendants or their successors the costs of said appeal or appeals, and will also pay to the defendant Collector of Customs, or his successor, in such event the salaries at over-time rates for Sundays and holidays of the inspectors of customs employed upon the Upper Steel Arch Bridge at Niagara Falls, N. Y., so-called, and the Queenston-Lewiston Bridge at Lewiston, from the date of the commence-
34 ment of this action to the date of such payment, not exceeding the sum of Five thousand dollars ($5,000.00).

In witness whereof, the said surety has caused these presents to be signed by its officers thereunto duly authorized and its corporate seal to be hereunto affixed, this 4th day of January, 1921.

MARYLAND CASUALTY COMPANY OF
BALTIMORE, MARYLAND,
[SEAL.] By PAUL MALONE,
*Atty. in Fact.*

*Opinion.*

District Court of the United States, Western District of New York.

INTERATIONAL RAILWAY COMPANY

against

GEORGE G. DAVIDSON, JR., Collector of Customs.

Cohn, Chormann & Franchot (Basil Robillard, Esq., of Counsel) of Niagara Falls, New York, for plaintiff.

Stephen T. Lockwood, United States Attorney, (John T. Walsh, Special Assistant United States Attorney of Counsel) of Buffalo, New York, for defendant.

35 HAZEL, *District Judge:*

Motion to enjoin the Collector of Customs of the port of Buffalo from closing international toll bridges over Niagara River at Niagara Falls, N. Y., on Sundays and holidays on the ground that the plaintiff owner declines to pay for extra services performed by inspectors of customs on such days at a double time rate. According to the affidavit of the Collector he does not intend to close the toll bridges to traffic on Sundays and holidays, but in the performance of his duties he has promulgated certain rules relating to the inspection of baggage of passengers arriving on defendant's trolley cars from Canada, and to other vehicles using the toll bridges for entering the United States from Canada, and to baggage carried by trolley cars or other conveyances, and inspecting the baggage of pedestrians, requiring its surrender to the Collector for the purpose of examining it on the day succeeding a Sunday or holiday unless the plaintiff complies with section 5 of the Act of February 13, 1920 requiring payment by it of such extra services performed on Sundays and holidays by the customs inspectors.

Defendants challenge the right of the Collector to enforce any such rules or to require payment by them for any such services. Upon reading the various statutes relating to the subject matter, to wit: Section 3100 R. S., section 5 of the Act of February 13, 1911, and the amendatory Act of February 7, 1920, I have become satisfied that any vessel, car or other conveyance arriving from a
36 foreign country, and articles imported therefrom in such conveyances must be unladen in the presence of a customs inspector to determine the dutiability of the merchandise; that the Secretary of the Treasury is authorized to prescribe regulations relating to the arrival of conveyances from a foreign country other than a vessel, and application for a special license to lade or unlade any conveyance at night or on Sunday and holidays shall be made and good and sufficient bond executed as a condition of receiving a permit for immediate lading or unlading; that the Secretary of the Treasury is required to fix a reasonable rate of extra compensation

or overtime service by inspectors who are on duty at night or on Sundays or holidays performing such services; and that such extra compensation shall be paid by the master, owner or consignee of the vessel or other conveyance "whenever such a special license or permit for lading or unlading shall be granted."

Plaintiff insists that such provisions are limited to vessels or other conveyances carrying cargoes or freight and do not include passengers' baggage since the baggage carried is merely an incident of the transportation of the person. No doubt the earlier statute was intended to apply to vessels and their cargoes, but inclusion by the amendatory Act of 1911 of the words "other conveyances", and the later inclusion by the Act of 1920, section 5, of the words "receiving or examination of passengers' baggage" would seem to imply extra compensation for immediate examination of passengers' baggage. A reasonable construction of the Act requires, I think, that the plaintiff apply for a permit for immediate examination of baggage
37 and unlading on the specified days if it desires a continuance of such service.

The rules suggested or promulgated by the Collector, relating to the surrender and examination of baggage carried by trolley passengers or by other vehicular passengers on Sundays or holidays on the next secular day, and the requirements that plaintiff use reasonable means to advise persons using the toll bridges that no examination of passengers' baggage and vehicles would be made by the inspectors until the day succeeding a Sunday or holiday were not in my opinion unreasonable or unconstitutional. The Collector I think acted within his jurisdiction and the rights of the plaintiff are not in any way impaired since it has the right to a special license or permit and to the service of an inspector for immediate examination of the baggage of its arriving passengers and conveyances using the bridge. It is true that there is no specific authority for licensing a toll bridge (obviously not a conveyance) for lading or unlading, yet since plaintiff concededly is owner of the bridges and trolley cars carrying the baggage of its passengers for hire and using the bridges for transportation, and collecting tolls, the provisions of the statute apply to it.

It is also argued that since the statute requires advance reports of arrivals of vessels or other conveyances, i. e., freight cars for example, the contended limitation to such instrumentalities is
38 clear since bridge companies and conveyances like automobiles could not report their arrival in advance. I think, however, a fair and proper construction of the Act of 1920, read in connection with the Act of 1911, does not require any such limitation, but rather implies that as to the term "any other conveyances", which I think includes trolley cars or other vehicles, the Secretary of the Treasury or the Collector of the port may prescribe such suitable rules as in their judgment may be necessary, and in that regard this court can not substitute its judgment for theirs.

The injunction prayed for is denied. Two days' notice of entry of order to plaintiff.

Dated, December 24, 1920.

JOHN R. HAZEL,
*D. J.*

*Bond on Appeal.*

Know all men by these presents, that the undersigned Maryland Casualty Company of Baltimore, Maryland, a surety company duly organized to transact business of surety in the State of New York, is held and firmly bound unto the above named George G. Davidson, Jr., individually and as Collector of Customs of the Port of Buffalo; John Doe and Richard Roe, whose names are unknown to this complainant, it being thereby intended to indicate and designate the officers, agents, deputies, under-collectors and employees of the said George G. Davidson as Collector of Customs of the Port of
39 Buffalo, of the City of Buffalo, in the sum of Two Hundred Fifty Dollars ($250) to be paid to the said George G. Davidson, Jr., individually and as such collector, and the said officers, agents, employees of the said George G. Davidson, Jr., as such collector, for the payment of which well and truly to be made, we bind ourselves, our successors and assigns jointly and severally firmly by these presents.

Sealed with our seals and dated the 19th day of January, 1921.

Whereas, the above named International Railway Company has prosecuted an appeal to the Circuit Court of Appeals of the United States for the Second Circuit to reverse the orders and final decree rendered in the above entitled suit by the Judge of the District Court of the United States for the Western District of New York.

Now, therefore, the condition of this obligation is such, that if the above named International Railway Company shall prosecute the said appeal to effect and answer all damages and costs, if it fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

MARYLAND CASUALTY COMPANY
OF BALTIMORE, MARYLAND,
[SEAL.] By PAUL MALONE,
*Atty. in Fact.*

40 The foregoing bond is hereby approved as to form, amount and sufficiency of sureties.

JOHN R. HAZEL,
*United States Judge.*

*Stipulation as to Contents of Record.*

United States District Court for the Western District of New York.

INTERNATIONAL RAILWAY COMPANY, Complainant,

against

GEORGE G. DAVIDSON, JR., etc., et al., Defendants.

It is hereby stipulated, by the parties hereto, pursuant to the rules of the United States District Court for the Western District of New York, in reference to printing of records on appeal, that the following papers shall be printed by the appellant in this action, and that when so printed said papers shall be deemed to constitute a transcript of the record for all purposes in connection with this appeal, viz.:

41 Citation, petition and order for appeal, final order and decree, assignment of errors, statement of case, undertaking, opinion, bond on appeal, stipulation of attorneys as to printed record, certificate of the Clerk of the District Court, and this stipulation.

Dated: Buffalo, N. Y., January 30, 1921.

STEPHEN T. LOCKWOOD,
*United States Attorney.*
COHN, CHORMANN & FRANCHOT,
*Attorneys for Complainant.*

*Stipulation as to Printed Record.*

United States Circuit Court of Appeals for the Second Circuit.

INTERNATIONAL RAILWAY COMPANY, Appellant,

against

GEORGE G. DAVIDSON, etc., et al., Respondents.

It is hereby stipulated, and agreed that the foregoing printed pages contain and are a true transcript of the record on
42 appeal herein, as agreed upon by the parties.

Dated: Buffalo, N. Y., January 30, 1921.

STEPHEN T. LOCKWOOD,
*United States Attorney for Respondents.*
COHN, CHORMANN & FRANCHOT,
*Attorneys for Appellant.*

*Certificate of Clerk.*

UNITED STATES OF AMERICA,
*Western District of New York*, ss:

I, Harris S. Williams, Clerk of the District Court of the United States of America for the Western District of New York do hereby certify that the foregoing and annexed printed copy has been presented to me with a stipulation by the attorneys of the parties; that such printed copy is a true transcript of the record on appeal to the United States Circuit Court of Appeals, Second Circuit, to review a judgment of the United States District Court for the Western District of New York, in the action in said District Court entitled International Railway Company v. George G. Davidson, etc., et al., as agreed on by the parties, and I do certify the same to be the transcript of record on said review.

In testimony whereof, I have caused the seal of the said court to be affixed at the City of Buffalo, in said District, this 30th day of January, A. D., 1921.

HARRIS S. WILLIAMS,
[SEAL.] *Clerk.*

43 United States Circuit Court of Appeals for the Second Circuit, October Term, 1920.

No. 216.

INTERNATIONAL RAILWAY COMPANY, Complainant-Appellant,

against

GEORGE G. DAVIDSON, Individually and as Collector of Customs of the Port of Buffalo; John Doe and Richard Roe, Whose Names are Unknown, etc.

Appeal from the District Court of the United States for the Western District of New York.

Argued March 8, 1921, Decided April 20, 1921.

Before Ward, Hough, and Manton, Circuit Judges.

Cohn, Chormann & Franchot, for Appellant;
P. Robillard, of Counsel.
Stephen T. Lockwood, United States Attorney, for Appellees;
J. T. Walsh, of Counsel.

WARD, *Circuit Judge:*

This is an appeal from a decree of the District Court of the United States for the Western District of New York dismissing the
44 plaintiff's bill for lack of equity. The International Railway Company owns and operates two public toll bridges across the

Niagara River between the United States and Canada, upon each of which it also operates a line of passenger trolley cars. The Government had always maintained customs inspectors at the American end of the bridges both day and night and on Sundays and holidays.

Congress by the Act of February 7, 1920, amended Section 5 of the Act of February 13, 1911, so as to read:

"The Secretary of the Treasury shall fix a reasonable rate of extra compensation for overtime services of inspectors, storekeepers, weighers, and other customs officers and employees who may be required to remain on duty between the hours of five o'clock postmeridian and eight o'clock antemeridian, or on Sundays or holidays, to perform services in connection with the lading or unlading of cargo, or the lading of cargo or merchandise for transportation in bond or for exportation in bond or for exportation with benefit of drawback, or in connection with the receiving or delivery of cargo on or from the wharf, or in connection with the unlading, receiving, or examination of passengers' baggage, such rates to be fixed on the basis of one-half day's additional pay for each two hours or fraction thereof of at least one hour that the overtime extends beyond five o'clock postmeridian (but not to exceed two and one-half days' pay for the full period from five o'clock postmeridian to eight o'clock antemeridian), and two additional days' pay for Sunday or holiday duty. The said extra compensation shall be paid by the master, owner, agent, or consignee of such vessel or other conveyance whenever such special license or permit for immediate lading or unlading or for lading or unlading at night or on Sundays or holidays shall be granted to the collector of customs, who shall pay the same to the several customs officers and employees entitled thereto according to the rates fixed therefor by the Secretary of the Treasury; Provided, that such extra compensation shall be paid if such officers or employees have been ordered to report for duty and have so reported, whether the actual lading, unlading, receiving, delivery, or examination takes place or not. Customs officers acting as boarding officers and any customs officer who may be designated for that purpose by the Collector of Customs are hereby authorized to administer the oath or affirmation herein provided for, and such boarding officers shall be allowed extra compensation for services in boarding vessels at night or on Sundays or holidays at the rates prescribed by the Secretary of the Treasury as herein provided, the said extra compensation to be paid by the master, owner, agent, or consignee of such vessel: Provided, further, that in those ports where customary working hours are other than those hereinabove mentioned, the collector of customs is vested with authority to regulate the hours of customs employees so as to agree with prevailing working hours in said ports, but nothing contained in this proviso shall be construed in any manner to affect or alter the length of a working day for customs employees or the overtime pay herein fixed."

Sec. 161 U. S. Revised Statutes provides:

"The head of each department is authorized to prescribe regulations, not inconsistent with law for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use and preservation of the records, papers and property appertaining to it."

Regulations under this section have the force of law and need not be promulgated in any set form or in writing, Haas v. Henkel,
46 216 U. S., 462, 480; Boske v. Comingore, 177 U. S. 459, 467.

After the passage of this act the defendant Davidson, Collector of Customs for the Ninth Customs District, by direction of the Secretary of the Treasury, notified the plaintiff:

"that unless the complainant would pay two days' pay for each Sunday or holiday for each customs officer performing service in connection with the said company, importation of all merchandise on Sundays and holidays would be stopped, and sent the following instructions to the Deputy Collector at Niagara Falls:

1. Trolleys may come in after full examination.

2. Trolley passengers may come in after surrendering all baggage and effects, to be examined after 8:00 A. M. on the day succeeding each Sunday or holiday.

3. Foot passengers may come in after surrendering all baggage and effects, to be examined after 8:00 A. M. on the day succeeding each Sunday or holiday.

4. All vehicular passengers except trolley passengers may come in after surrendering all baggage and effects, to be examined after 8:00 A. M. on the day succeeding such Sunday or holiday. All such vehicles will not be allowed to enter the United States until after their examination on the day succeeding each Sunday or holiday.

5. All outgoing traffic may proceed as usual.

6. There must be no examination of incoming passengers' baggage, freight or merchandise, no matter how small, including autos, teams and other vehicles except trolleys.

47 7. Any baggage left for examination by customs officers will be held at owner's risk.

8. You will use all reasonable means to advise all persons leaving the United States by way of bridges that there will be no examination of passengers' baggage and vehicles other than trolley cars until the day succeeding each Sunday or holiday.

9. You will understand that you are not to interfere with passenger traffic but must postpone all examinations until the day succeeding each Sunday or holiday.

10. These instructions are not confidential and may be shown to any interested party, and that such instructions were issued under orders of the United States Treasury Department, and as Collector of Customs."

Thereupon the International Railway Company filed this bill praying that the defendant be restrained from enforcing the regulations. Judge Hazel entered a decree dismissing the bill for want of equity.

The plaintiff contends that the Act of 1911 as amended by the Act of 1920 contemplates only vessels and conveyances carrying cargo and that the secretary of the Treasury has no authority under it to make the regulations in question applying to trolley cars, automobiles and other vehicles and passenger baggage. Assuming this to be so we still think that the Secretary may make the regulations in question under under Sec. 161 of the Revised Statutes for the purpose of enforcing the statutes regulating the importation of merchandise on the northern frontier of the United States adjacent to Canada, Secs. 5807/12 U. S. Comp. Stat. which apply not only to cargo laden vessels and conveyances but to all conveyances and passenger baggage.

48 It would of course be impossible to maintain custom inspectors day and night, Sundays and holidays at every road crossing the northern frontier or at contiguous points along the shore of every lake. It is reasonable to maintain such inspection only where in the discretion of the Secretary of the Treasury the extent and character of the travel justify doing so. This may be wisely and effectively done at the American end of bridges like those involved in this case. But there is no obligation upon the part of the Government to maintain such inspection at night or on Sundays and holidays. Regulations as to the inspection of conveyances and personal baggage similar to those provided by the Act of Feb. 7, 1920, even if not prescribed by that statute cannot be regarded as inconsistent with law.

The appellant is quite wrong in saying that the Secretary of the Treasury compels it to pay for the cost of such inspection. He simply says that unless the plaintiff does agree to pay for it such inspection will not be maintained. We are also not at all persuaded by the argument that because non-dutiable goods may be imported into the United States no inspection can be enforced in respect to them before entry. Government inspection is an essential prerequisite to entry. Only so can it be determined whether goods in point of fact are dutiable. U. S. v. Waltham Watch Movements, 139 Fed. Rep., 291. Carriages, automobiles and other conveyances and personal baggage may be reasonably detained to await such inspection. Otherwise a holiday would be afforded for smuggling. On the other hand the regulations recognize that it is unnecessary to detain the plaintiff's passenger trolley cars, which run regularly forward and back on fixed tracks day in and day out throughout the year.

The plaintiff has no standing to question these regulations which do not apply to it but to the owners of private conveyances and of personal baggage brought over the bridge.

The decree is affirmed.

49 At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit Held at the Court Rooms, in the Post Office Building, in the City of New York, on the 30th day of April, One Thousand Nine Hundred and Twenty-one.

Present:

Hon. Henry G. Ward,
Hon. Charles M. Hough,
Hon. Martin T. Manton,
Circuit Judges.

INTERNATIONAL RAILWAY COMPANY, Complainant-Appellant,

v.

GEORGE G. DAVIDSON, JR., Individually, and as Collector, etc., Defendant-Appellee.

Appeal from the District Court of the United States for the Western District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Western District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said District Court be and it hereby is affirmed.

H. G. W.
M. T. M.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

50 [Endorsed:] United States Circuit Court of Appeals Second Circuit. International Ry. Co., v. G. G. Davidson, Jr. Order for Mandate. United States Circuit Court of Appeals Second Circuit. Filed May 2, 1921. William Parkin, Clerk.

51 Supreme Court of United States.

INTERNATIONAL RAILWAY COMPANY, Complainant, Appellant,

v.

GEORGE G. DAVIDSON, Individually and as Collector of Customs of the Port of Buffalo; John Doe and Richard Roe, Whose Names are Unknown to This Complainant, it Being Thereby Intended to Indicate and Designate the Officers, Agents, Deputies, Under-Collectors and Employees of the said George G. Davidson, as Collector of Customs of the Port of Buffalo of the City of Buffalo, Defendant, Appellee.

The above named plaintiff, International Railway Co., conceiving itself aggrieved by the order entered on April 30th, 1921, in the above entitled proceeding, doth hereby appeal from said order in the Supreme Court of United States, and prays that this, its appeal, may be allowed, and that transcript of the record and proceeding and papers upon which the said order was made, duly authenticated, may be sent to the Supreme Court of United States.

COHN, CHORMANN & FRANCHOT,
*Attorneys for Plaintiff and Appellant,*
*International Railway Co.*

430 Gluck Building, Niagara Falls, N. Y.

Washington, D. C., May 19th, 1921.

And now to wit: on May 19th, 1921:
It is ordered, that the appeal herein be allowed as prayed for.

LOUIS D. BRANDEIS,
*Associate Justice of Supreme*
*Court of the United States.*

52 [Endorsed:] Supreme Court of United States. International Railway Company, Appellant, v. George G. Davidson, individually, etc., et al., Defendant. Copy. Appeal and Allowance. Cohn, Chormann & Franchot, Attorneys for International Ry. Co. Office and Post Office Address, 430-443 Gluck Building, Niagara Falls, New York.

53 Supreme Court of United States.

INTERNATIONAL RAILWAY COMPANY, Complainant, Appellant,

v.

GEORGE G. DAVIDSON, JR., Individually and as Collector of Customs, etc., et al., Defendant-, Appellee.

STATE OF NEW YORK,
*County of Niagara, ss:*

Basil Robillard, being duly sworn, deposes and says; I live at Niagara Falls, New York, and I am one of the attorneys for complainant-appellant in this action. I requested Mr. George G. Davidson, Collector of Customs at the Port of Buffalo, to give me a statement of the amount of the salaries of the Collectors of Customs at the Upper Steel Arch Bridge, so-called, and the Lewiston-Queenston Bridge, so-called, which bridges across the Niagara River and the Canadian boundary, respectively at Niagara Falls and Lewiston, New York, and in response to said request, I was informed by Said George G. Davidson, Jr., that the amount of said salaries of such Collectors for Sunday and holiday work at overtime rate from December 4, 1920 to and including June 1, 1921, being for a half year period, would amount to approximately $1,750, and that for an entire year the said tolls would amount to approximately $3,400.

BASIL ROBILLARD.

Subscribed and sworn to before me this 18th day of May, 1921.

CLARENCE R. REMALS,
*Notary Public in and for the*
*County of Niagara, N. Y.*

54 [Endorsed:] Supreme Court of the United States. International Railway Company, Appellant, v. George G. Davidson, Jr., individually, etc., et al., Respondents. Copy. Affidavit. Cohn, Chormann & Franchot, Attorneys for Appellant, Office and Post Office Address, 430-443 Gluck Building, Niagara Falls, New York.

55 In the United States Circuit Court of Appeals for the Second Circuit.

INTERNATIONAL RAILWAY COMPANY, Appellant (Complainant Below),

against

GEORGE G. DAVIDSON, Individually and as Collector of Customs of the Port of Buffalo; John Doe and Richard Roe, Whose Names are Unknown to This Complainant, It Being Thereby Intended to Designate the Officers, Agents, Deputies, Under-collectors and Employees of the said George G. Davidson, as Collector of Customs of the Port of Buffalo, of the City of Buffalo, Respondents (Defendants Below).

*Bond on Appeal.*

Know all men by these presents, that the undersigned Maryland Casualty Company of Baltimore, Maryland, a surety company duly organized to transact business of surety in the State of New York, is held and firmly bound unto the above named George G. Davidson, Jr., individually and as Collector of Customs of the Port of Buffalo; John Doe and Richard Roe, whose names are unknown to this complainant, it being thereby intended to designate the officers, agents, deputies, under-collectors and employees of the said George G. Davidson as Collector of Customs of the Port of Buffalo, of the City of Buffalo, in the sum of Two Hundred Fifty dollars ($250) to be paid to the said George G. Davidson, Jr., individually and as such collector, and the said officers, agents, employees of the said George G. Davidson, Jr., as such collector, for the payment of which well and truly to be made, we bind ourselves, our successors and assigns jointly and severally firmly by these presents.

Sealed with our seals and dated the 18th day of May, 1921.

Whereas, the above named International Railway has presented an appeal to the Supreme Court of the United States to reverse the orders and final decrees rendered in the above entitled suit by the Judge of the District Court of the United States for the Western District of New York, and by the Circuit Court of Appeals of the United States or the Second Circuit.

Now, therefore, the condition of this obligation is such. that
56 if the above named International Railway Company shall prosecute the said appeal to effect and answer all damages and costs, if it fail to make said appeal good, then this obligation shall be void, otherwise to remain in full force and virtue.

[SEAL.] MARYLAND CASUALTY COMANY OF BALTIMORE, MARYLAND,
By JOHN F. MALONE, JR.,
*Atty. in Fact.*

The foregoing bond is hereby approved as to form, amount and sufficiency of sureties.

LOUIS D. BRANDEIS,
*Associate Justice U. S. Supreme Court.*

57 The Maryland Casualty Company hereby certifies that this instrument is a copy of an original Power of Attorney to which a stamp, as required by the War Revenue Act of 1917, has been affixed and cancelled.

STATE OF NEW YORK,
*County of Erie,*
*City of Buffalo,* ss:

On the 18 day of May in the year 1921, before me personally came John F. Malone, Jr., to me known, who being by me duly sworn, did depose and say that he resided in the City of Buffalo, New York, that he is the Attorney-in-Fact of the Maryland Casualty Company, the Corporation described in and which executed the attached instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was affixed thereto by order of the Executive Committee of the Board of Directors of said Corporation, and that he signed his name thereto by like order; and that said Corporation has received from the Superintendent of Insurance a certificate of solvency under Section 182 of the Insurance Laws of the State of New York as amended by Chapter 182 of the Laws of 1913, and that such certificate has not been revoked.

FLORENCE M. HOKE,
*Notary Public.*

Commissioner of Deeds in and for the City of Buffalo, N. Y.

*Extracts from By-Laws of Maryland Casualty Company, Baltimore.*

Article II—Entitled "Directors."

Section 5. Regular Meetings of the Board of Directors shall be held at the Office of the Company, in the City of Baltimore, during the months of March, June, September and December.

Section 9. The Board shall elect, by ballot, at their first meeting after their election by the Stockholders, a President, one or more Vice-Presidents, and Executive Committee of eight from among their number.

Article VIII—Entitled "Executive Committee."

Section 1. All the powers of the Board of Directors when same is not in session shall be exercised by the Executive Committee so far as the same can be legally done.

Extracts from minutes of the meeting of the Executive Committee of the Board of Directors of the Maryland Casualty Company held in

the City of Baltimore, Maryland, on the 16th day of February, A. D., 1920, at which the following Resolution was adopted, to wit:

Whereas, the Maryland Casualty Company in order to facilitate its business of becoming surety on bonds is required to execute bonds in places other than the Home Office upon application being made for same.

Now, therefore, be it resolved, that Paul Malone and John F. Malone, Jr., of the City of Buffalo, are hereby appointed Attorneys-in-Fact of this Company at Buffalo, New York, and either of them in such capacity is hereby authorized and empowered to execute, sign, seal and deliver in the name and on behalf of said Company as surety, bonds and undertakings as follows: Any and all bonds and writings obligatory, of any kind, character, and description, except only that no authority is hereby given to said Attorneys-in-Fact to execute any of the following bonds and obligations, to wit: Bonds guaranteeing leaseholds, charter parties, payment of rentals, treasurers, sheriffs, constables, liquor and excise bonds, public officials collecting taxes.

Such bonds and undertakings for said purposes (except such bonds and undertakings as have been hereby specifically excepted) when duly executed by either Paul Malone or John F. Malone, Jr., as Attorney-in-Fact, shall be as binding upon the said Company as Surety, as fully and to all intents and purposes as if said bonds and undertakings had been duly executed and acknowledged and delivered by the regularly elected officers of the Company.

This Resolution revokes, annuls, supersedes and renders void all authority granted in a Resolution of the Executive Committee of the Board of Directors of the Maryland Casualty Company bearing date of the 8th day of September, A. D. 1919.

I, E. E. Kolb, Assistant Secretary of the Maryland Casualty Company do hereby certify that the aforegoing extracts from the By-Laws of said Company are true and correct copies as taken from the records of said Company, and I do further certify that I have compared the aforegoing extracts and transcripts from the Minutes of the Executive Committee with the original thereof, as recorded in the Minute Book of said Company, and do certify that the same is a true and correct transcript therefrom, and of the whole of said original Resolution; and that the said Resolution has not been revoked or rescinded.

Given under my hand and seal of the Company, at the City of Baltimore, State of Maryland, this *day of* Nov. 8, A. D., 1920.

[Seal of the Maryland Casualty Company.]

E. E. KOLB,
*Assistant Secretary.*

*Statement of the Financial Condition of Maryland Casualty Company at Close of Business December 31st, 1919.*

Assets.

| | |
|---|---|
| Stocks and bonds Insurance Commissioner's Value | $15,376,844.77 |
| Real Estate | 1,663,356.06 |
| Loans secured by pledge of bonds | 16,936.50 |
| Cash in Banks and Office | 1,166,097.27 |
| Premiums in Course of Collection Less than 90 days | 3,023,836.55 |
| Reinsured Losses Due from other Companies | 16,524.93 |
| Interest Accrued | 116,606.94 |
| Salvage | 43,617.65 |
| Proportion of Co-Insurance premiums on Coal Mines and Prohibited Risks in course of collection to be remitted to other Companies | 258,594.91 |
| Total | $21,682,415.58 |

Liabilities.

| | |
|---|---|
| Capital Stock | $2,000,000.00 |
| Premium Reserve | 6,696,514.86 |
| Premium Tax Reserve | 391,864.32 |
| Reserve for Unadjusted Claims | 8,917,640.14 |
| Commissions Due on Premiums in Course of Collection Less than 90 Days | 626,438.36 |
| Reserve for expenses of investigating and adjustment of unpaid claims | 48,194.00 |
| Sundry Accounts Reserve | 58,115.54 |
| Reinsurance Premiums Due other Companies | 91,488.52 |
| Due Associated Companies for Co-Insurance Premiums | 212,973.02 |
| Voluntary Additional Reserve | 500,000.00 |
| Surplus | 2,139,191.82 |
| Total | $21,682,415.58 |

STATE OF NEW YORK,
*County of Erie,*
*City of Buffalo, ss:*

John F. Malone, Jr., being duly sworn, says that he is the Attorney-in-Fact of the Maryland Casualty Company, and that the above is a correct statement of the financial condition of the Company on December 31st, 1919.

JOHN F. MALONE, JR.

Sworn to and subscribed before me this Nov. 8 *day of* A. D., 1920.

FLORENCE M. HOKE,
*Notary Public.*

Commissioner of Deeds in and for the City of Buffalo, N. Y.

58 [Endorsed:] U. S. Circuit Court of Appeals for the Second Circuit. International Railway Company, Appellant, vs. George G. Davidson, individually and as Collector of Customs of the Port of Buffalo, etc., Respondent. Copy. Supersedeas Bond. Cohn, Chormann & Franchot, Attorneys for Appellant. Office and Post Office Address, 430-443 Gluck Building, Niagara Falls, New York.

59 Supreme Court of the United States.

INTERNATIONAL RAILWAY COMPANY, Plaintiff-Appellant,

against

GEORGE G. DAVIDSON, Individually and as Collector of Customs of the Port of Buffalo; John Doe and Richard Roe, Whose Names are Unknown to This Appellant, it Being Thereby Intended to Indicate and Designate the Officers, Agents, Deputies, Under-Collectors and Employees of the said George G. Davidson as Collector of Customs of the Port of Buffalo, of the City of Buffalo, Defendants-Appellee.

And now comes International Railway Company, plaintiff-appellant, and makes and files this its assignment of error:

I. The Circuit Court of Appeals of the United States for the Second Circuit erred in refusing to direct that the court below grant a temporary injunction as prayed in the bill of complaint, for the reason that the threatened actions of the defendants-appellee were undisputed and were illegal and ultra vires, and that it was undisputed that such threatened actions would work an irreparable injury to the plaintiff-appellant and to the traveling public, which could not be compensated in damages, and for which the plaintiff-appellant has no adequate remedy at law.

II. The District Court of the United States for the Western District of New York erred in refusing to grant a temporary injunction as prayed, for the same reasons.

III. The said Circuit Court of Appeals erred in refusing to direct the court below to grant a permanent injunction herein, as prayed in the bill of complaint, for the reason that it conclusively
60 appeared from the affidavits submitted that the actions threatened by the defendants-appellee were illegal and ultra vires; and for the further reason that it was undisputed that such threatened actions would work an irreparable injury to the plaintiff-appellant and to the traveling public, which could not be compensated in damages, and for which the plaintiff-appellant has no adequate remedy at law.

IV. The said District Court erred in refusing to grant a permanent injunction for the same reasons.

V. The said Circuit Court of Appeals erred in affirming the order of the said District Court which vacated the temporary restraining order granted below, for the reason that it conclusively appeared from the affidavits submitted that the threatened actions of the defendants-appellee were illegal and ultra vires; and for the further reason that it was undisputed that such threatened actions would work an irreparable injury to the plaintiff-appellant and to the traveling public, which could not be compensated in damages, and for which the plaintiff-appellant has no adequate remedy at law.

VI. Said District Court erred in vacating said temporary restraining order, for the same reasons.

VII. The said Circuit Court of Appeals erred in affirming the order, judgment and decree of the said District Court which dismissed the bill of complaint herein for lack of equity, and in affirming the order denying a temporary or permanent writ of injunction against the actions of the defendants-appellee herein, and in refusing to direct a temporary or permanent writ of injunction against the said defendants-appellee herein, for the reason that from the undisputed and stipulated facts before the Court, it appeared that the defendants-appellee threatened unlawfully and without authority to
61 interfere with the business of the plaintiff-appellant and the free and fair traffic of persons across the toll bridges owned and operated by plaintiff-appellant, and threatened to stop said traffic, or a portion thereof, unlawfully and without authority, and threatened to warn persons intending to use said toll bridges that traffic thereon from Canada to the United States would not be permitted,—all contrary to the laws of the United States of America, and to the rights of this plaintiff-appellant in and upon its toll bridges; and for the further reason that said injury to the plaintiff-appellant would be irreparable and not compensable in damages, and that plaintiff-appellant has no adequate remedy in law therefor.

VIII. Said District Court erred in dismissing said bill of complaint below for lack of equity, and in refusing to grant a temporary or permanent writ of injunction aginst the threatened actions of the defendants-appellee, for the same reason.

IX. Said Circuit Court of Appeals erred in affirming the order, judgment and decree of the said District Court dismissing said bill of complaint for lack of equity, and in affirming the order denying a temporary or permanent writ of injunction against the actions of the defendants-appellee herein, and in refusing to direct a temporary or permanent writ of injunction against the said defendants-appellee herein, for the reason that the undisputed threatened actions of the defendants-appellee were contrary to the laws of the United States and contrary to the authority of the defendants-appellee thereunder; and for the further reason that said undisputed threatened action would work irreparable damage to the plaintiff-appellant, not compensable in money damages; and that plaintiff-appellant has no adequate remedy at law.

X. Said District Court erred in dismissing said bill of complaint for lack of equity, and in refusing to grant a temporary or
62 permanent writ of injunction against the threatened actions of the defendants-appellee, for the same reasons.

XI. Said Circuit Court of Appeals erred in affirming said order, judgment and decree of said District Court in favor of the defendants-appellee, finally dismissing said bill of complaint for lack of equity, and in affirming the order denying a temporary or permanent writ of injunction against the actions of the defendants-appellee herein, and in refusing to direct a temporary or permanent writ of injunction against the said defendants-appellee herein, for the reason that it appeared undisputed from the papers before the Court that the threatened actions of the defendants-appellee purported to be in pursuance, and in the enforcement, of a statute of the United States, being the Act of Congress approved February 7, 1920, amending Sec. 5 of Chapter 46 of the Acts of Congress of 1911, and that defendants-appellee threatened thereunder to require plaintiff-appellant to pay the salaries of customs collectors of the Treasury Department of the United States for services in inspecting the baggage of persons entering the United States over the toll bridges of the plaintiff-appellant on Sundays and holidays; and for the further reason that said statute, even if enforceable in the manner threatened by the defendant-appellee, is unconstitutional, null and void for the reason that it attempts to take the property of the plaintiff-appellant without due process of law, and to take the private property of the plaintiff-appellant for public use without just compensation, contrary to Article 5 of the Amendments to the Constitution of the United States; and for the further reason that the said defendants-appellee threatened to so illegally misconstrue and unlawfully enforce said statute as to render the same unconstitutional, null and void, and contrary to the Fifth Amendment to the Constitution of the United States, in that said statute as so enforced would take the private property of the plaintiff-appellant for public
63 use without just compensation, and would take the property of the plaintiff-appellant without due process of law.

XII. Said District Court erred in finally dismissing said bill of complaint for lack of equity, and in refusing to grant a temporary or permanent writ of injunction against the threatened actions of the defendants-appellee, for the same reasons.

XIII. Said Circuit Court of Appeals erred in affirming the said judgment, order and decree of the District Court dismissing the bill of complaint herein for lack of equity, and in affirming the order denying a temporary or permanent writ of injunction against the actions of the defendants-appellee herein, and in refusing to direct a temporary or permanent writ of injunction against the said defendants-appellee herein, for the reason that the said statute indisputably threatened to be enforced by the actions of the defendants-appellee, against which actions an injunction was prayed, does not apply to the toll bridges of the plaintiff-appellant or any toll bridges, but

only to conveyances and vehicles; and for the further reason that said statute does not apply to any car, carrier or conveyance except water-borne vessels and other conveyances, and that the toll bridges of the plaintiff-appellant, against which the defendants-appellee so unlawfully threatened to enforce said statute, was not a water-borne vessel or other conveyance.

XIV. Said District Court erred in finally dismissing the said bill of complaint herein for lack of equity, and in refusing to grant a temporary or permanent writ of injunction against the threatened actions of the defendants-appellee, for the same reasons.

XV. Said Circuit Court of Appeals erred in affirming the order, judgment and decree of said District Court, finally dismissing
64 said bill of complaint for lack of equity, and in affirming the order of said District Court refusing said temporary and permanent writs of injunction as prayed in said bill of complaint, for the reason that the defendants-appellee threatened to distrain and impound baggage of passengers upon the toll bridges of the plaintiff-appellant, and to distrain and impound vehicles traveling upon the toll bridges of the plaintiff-appellant, as well when the said baggage and vehicles were submitted to the defendants-appellee for immediate inspection, as otherwise; and as well when an immediate inspection of the said baggage and vehicles was permitted by the said passengers and owners of said vehicles, as otherwise; and that said threatened actions were contrary to the statutes of the United States in such case made and provided, beyond the power of the said defendants-appellee; and that it was stipulated and undisputed before the Court that said actions would constitute an irreparable injury and damage to the plaintiff-appellant, not compensable in damages, and that plaintiff-appellant has no adequate remedy at law.

XVI. Said District Court erred in finally dismissing said bill of complaint herein, and in refusing a temporary writ of injunction, and a permanent writ of injunction, for the same reasons.

XVII. Said Circuit Court of Appeals erred in affirming the said judgment, order and decree of the District Court dismissing the bill of complaint herein for lack of equity, and in affirming the order denying a temporary or permanent writ of injunction against the actions of the defendants-appellee herein, and in refusing to direct a temporary or permanent writ of injunction against the said defendants-appellee herein, for the reason that upon the stipulation of facts and the bill of complaint, and the affidavits submitted, it was undis-
65 puted that traffic upon said toll bridges of the plaintiff-appellant had continued since the opening of the bridges prior to 1900, on Sundays and holidays, as well as on other days, down to the date of the commencement of this action, and that customs inspection had been rendered thereupon on every day, without charge to the plaintiff-appellant, and that the plaintiff-appellant has a vested right and property in and to a continuance of said traffic as well on Sundays and holidays as on other days; that the actions threatened

by the defendants-appellee would diminish or destroy said traffic irreparably, without making compensation therefor; and that said threatened acts were illegal and ultra vires, and the threatened damages not compensable in money; and that plaintiff-appellant has no adequate remedy at law.

XVIII. The said District Court erred in finally dismissing the said bill of complaint herein for lack of equity, and in refusing to grant a temporary or permanent writ of injunction against the threatened actions of the defendants-appellee, for the same reasons.

COHN, CHORMANN & FRANCHOT,
*Attorneys for Plaintiff-Appellant.*

Office & Postoffice Address, Nos. 430-443 Gluck Bldg., Niagara Falls, New York.

66 [Endorsed:] Supreme Court of the United States. International Railway Company vs. George G. Davidson, individually, etc., et al. Copy. Assignment of Errors. Cohn, Chormann & Franchot, Attorneys for Plaintiff-Appellant, Office and Post Office Address, 430-443 Gluck Building, Niagara Falls, New York.

67 UNITED STATES OF AMERICA,
*Southern District of New York, ss:*

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 66 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of International Railway Company, against George G. Davidson, individually and as Collector, et al., as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 24th day of May in the year of our Lord One Thousand Nine Hundred and twenty-one and of the Independence of the said United States the One Hundred and forty-fifth.

[Seal of United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
*Clerk.*

68 UNITED STATES OF AMERICA, *ss:*

To George G. Davidson, Jr., individually and as Collector of Customs of the Port of Buffalo; John Doe and Richard Roe, whose names are unknown to this complainant, it being thereby intended to indicate and designate the officers, agents, deputies, under-collectors, and employees of the said George G. Davidson as Collector of Customs of the Port of Buffalo, of the city of Buffalo, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington within thirty days from the date hereof, pursuant to an appeal filed in the Clerk's office of the Circuit Court of Appeals of the United States for the Second Circuit, wherein the International Railway Company is appellant, and George G. Davidson, individually and as Collector of Customs of the Port of Buffalo, John Doe and Richard Roe whose names are unknown to this complainant, it being thereby intended to indicate and designate the officers, agents, deputies, under-collectors and employees of the said George G. Davidson, as Collector of Customs of the Port of Buffalo of the City of Buffalo, are respondents, to show cause, if any there be, why the order in the said petition for appeal and allowance mentioned should not be corrected, and speedy justice should not be done to the parties on that behalf.

Witness the Honorable Louis D. Brandeis, Associate Justice of the Supreme Court of the United States, this 19th day of May, in the year of our Lord one thousand nine hundred and twenty-one.

LOUIS D. BRANDEIS.
*Associate Justice of Supreme Court.*

69 [Endorsed:] Supreme Court of United States. International Railway Company v. George G. Davidson, Jr., individually etc., et al. Original. Citation on Appeal. Cohn, Chormann & Franchot, Attorneys for International Ry. Co., Office and Post Office Address 430-443 Gluck Building, Niagara Falls, New York. Due service of the within is admitted. Dated May 21, 1921. John T. Walsh, Attorney for respondent.

Endorsed on cover: File No. 28,295. U. S. Circuit Court Appeals, 2d Circuit. Term No. 340. International Railway Company, appellant, vs. George G. Davidson, individually and as collector of customs of the port of Buffalo, et al. Filed June 2d, 1921. File No. 28,295.

FILED
NOV 25 1921
WM. R. STANSBURY
CLERK

# Supreme Court of the United States

October Term 1921

| | |
|---|---|
| INTERNATIONAL RAILWAY COMPANY, *Appellant, (Complainant below),* against GEORGE G. DAVIDSON, JR., individually and as Collector of the Port of Buffalo, *et al.*, *Respondent.* | *In Equity No. 340.* |
| THOMAS SNYDER, on behalf of himself and all others similarly situated, *Appellant,* against GEORGE G. DAVIDSON, JR., individually and as Collector of the Port of Buffalo, *et al.*, *Respondent.* | *In Equity No. 368.* |

## APPELLANTS' BRIEF

BASIL ROBILLARD,
*Of Counsel for Appellants,*
430-443 Gluck Bldg.,
Niagara Falls, N. Y.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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# Supreme Court of the United States

OCTOBER TERM, 1921.

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|---|---|
| INTERNATIONAL RAILWAY COMPANY,<br>*Appellant,*<br>*(Complainant below),*<br>against<br>GEORGE G. DAVIDSON, JR., individually and as Collector of the Port of Buffalo, *et al.*,<br>*Respondent.* | *In Equity No. 340.* |
| THOMAS SNYDER, on behalf of himself and all others similarly situated,<br>*Appellant,*<br>against<br>GEORGE G. DAVIDSON, JR., individually and as Collector of the Port of Buffalo, *et al.*,<br>*Respondent.* | *In Equity No. 368.* |

## APPELLANTS' BRIEF.

These cases involve similar facts. The first is brought by the owner of public toll bridges, the second by a person accustomed to travel upon these toll bridges. By an order of this court entered November 14th, 1921, the cases are directed to be heard together. A statement of facts under Equity Rule 77 was made in the first case (International Record, folios 12-32). The second case is similar, except that the relief demanded in the bill is broader.

*Statutes in Question.*

This appeal involves the statutory and inherent authority of the Treasury Department of the United States and of the Collector of Customs of the Ninth Customs District and the duties of the latter officer. There are three public toll bridges in the Ninth Customs District, two between Niagara Falls, New York, and Niagara Falls, Ontario, and the third between Lewiston, New York, and Queenston, Ontario. Two of them are owned and operated by the appellant, International Railway Company (International Record, Fol. 12). Since prior to 1900 customs inspectors have been stationed at the American ends of these bridges inspecting the baggage of pedestrians, inspecting vehicles and the hand baggage of trolley car passengers, all of whom cross the Canadian border upon these bridges (International Record, Fol. 12). No charge was made to the appellant, International Railway Company, for the customs officers' salaries until July, 1920, when, under the Act of Congress approved February 7, 1920, amending Chapter 46, Section V of the Act of Congress approved February 13, 1911, the Collector, respondent, demanded by letter that the appellant, International Railway Company, pay the salaries of customs inspectors at a fixed overtime rate for inspections made at the heads of these bridges on Sundays and holidays (International Record, Fols. 13-14).

This statute as amended is as follows (Comp. Stat, §§5559 *et seq.*):

"LICENSE TO LADE OR UNLADE AT NIGHT.

Upon arrival at any port in the United States of *any vessel or other conveyance* from a foreign port or place, either directly or by way of another port in the United States, or upon such arrival from another port in the United States of any vessel or other conveyance belonging to a line designated by the Secretary of the Treasury as a common carrier of bonded merchandise, and after due report and entry of such vessel in accordance with existing law or due report, under such regulations as the Secretary of the Treasury may prescribe, of the arrival of such other conveyances, the collector of customs, with the concurrence of the naval officer at ports where there is a naval officer, shall grant, upon proper application therefor, a special license to lade or unlade the cargo of any *such vessel or other conveyance* at night; that is to say, between sunset and sunrise."

SECTION 2:

"PRELIMINARY ENTRY OF VESSEL TO BOARDING OFFICER, AND LADING OR UNLADING THEREUPON.

The master of any vessel from a foreign port or place, upon arrival within a customs collection district of the United States, bound to a port of entry in such district, may make *preliminary entry* of the vessel by making oath or affirmation to the truth of the statements contained in his original manifest and delivering his said original manifest to the customs officer who shall board such vessel within such district, with a copy of said original manifest for the use of the naval officer at ports where there is a naval officer; *whereupon,* upon arrival at the wharf or place of discharge, *the* lading or *unlading* of the cargo of such vessel *may proceed,* by both day and night, under such regulations as the Secretary of the Treasury may prescribe."

SECTION 3:

"BOND FOR SPECIAL LICENSE TO LADE OR UNLADE AT NIGHT.

*Before any such special license* to lade or unlade at night *shall be granted* and before any permit shall be issued for the immediate lading, or unlading of any such vessel after preliminary entry, as hereinbefore provided, either by day or by night the master, owner, agent, or consignee of such vessel or other conveyance shall make *proper application therefor* and shall at the same time execute and deliver to the United States, through the collector of customs, a good and sufficient bond, in a penal sum to be approved by the said collector, conditioned to indemnify and save the United States harmless from any and all losses and liabilities which may occur or be occasioned by reason of the granting of such special license or the issuing or granting of such permit for immediate lading or unlading; or the master, owner, agent, consignee, or probable consignee, as aforesaid, may execute and deliver to the United States, in like manner and form, *a good and sufficient bond, in the penal sum of fifty thousand dollars, conditioned to indemnify and save the United States harmless from any and all losses and liabilities which may occur or be occasioned by reason of the granting of such special licenses and the issuing or granting of such permits for immediate lading or unlading by day and night during a period of six months.*"

SECTION 4:

"ISSUE OF SPECIAL LICENSES AND PERMITS.

*Application having been duly made and the required bond having been duly executed and delivered,* special license or licenses to lade or unlade at night *after* regular entry of vessels, and *due report of other conveyances,* may be granted, and a permit or permits may

be issued for the immediate lading and unlading, by day and night, of vessels admitted to preliminary entry, or of other conveyances of which due report of arrival has been made: Provided, that the provisions of this act shall extend and be applicable to any vessels or other conveyances bound to a port of entry in the United States to be unladen at a port of delivery or to be unladen at a place of discharge designated by the Secretary of the Treasury under the provisions of Section twenty-seven hundred and seventy-six of the Revised Statutes as amended: Provided further, that when preliminary entry of a vessel shall be made by the master as herein provided he shall not be relieved from making due report and entry of his vessel at the custom house in accordance with existing law, and any liability of the master or owner of any such vessel to the owner or consignee of any merchandise landed from her shall not be affected by the granting of such special license, but such liability shall continue until the merchandise is properly removed from the dock whereon the same may be landed."

"COMPENSATION FOR OVERTIME SERVICES; BOARDING OFFICERS MAY ADMINISTER OATHS; FIXING WORKING HOURS.

The Secretary of the Treasury shall fix a reasonable rate of extra compensation for overtime services of inspectors, storekeepers, weighers, and other customs officers and employees who may be required to remain on duty between the hours of five o'clock postmeridian and eight o'clock antemeridian, or on Sundays or holidays, to perform services in connection with the lading or unlading of cargo, or the lading of cargo or merchandise for transportation in bond or for exportation in bond or for exportation with benefit of drawback, or in connection with the receiving

or delivery of cargo on or from the wharf, or in connection with the unlading, receiving, or examination of passengers' baggage, such rates to be fixed on the basis of one-half day's additional pay for each two hours or fraction thereof of at least one hour that the overtime extends beyond five o'clock postmeridian (but not to exceed two and one-half day's pay for the full period from five o'clock postmeridian to eight o'clock antemeridian), and two additional days' pay for Sunday or holiday duty. *The said extra compensation shall be paid by the master, owner, agent, or consignee of such vessel or other conveyance whenever such special license or permit for immediate lading or unlading or for lading or unlading at night or on Sundays or holidays shall be granted* to the collector of customs, who shall pay the same to the several customs officers and employees entitled thereto according to the rates fixed therefor by the Secretary of the Treasury: Provided, that such extra compensation shall be paid if such officers or employees have been ordered to report for duty and have so reported, whether the actual lading, unlading, receiving, delivery or examination takes place or not. Customs officers acting as boarding officers and any customs officer who may be designated for that purpose by the Collector of Customs are hereby authorized to administer the oath or affirmation herein provided for, and such boarding officers shall be allowed extra compensation for services in boarding vessels at night or on Sundays or holidays at the rates prescribed by the Secretary of the Treasury as herein provided, the said extra compensation to be paid by the master, owner, agent, or consignee of such vessel: Provided, further, that in those ports where customary working hours are other than those herein-

above mentioned, the Collector of Customs is vested with authority to regulate the hours of customs employees so as to agree with prevailing working hours in said ports, but nothing contained in this proviso shall be construed in any manner to affect or alter the length of a working day for customs employees or the overtime pay herein fixed." (The italics are ours).

The pertinent provisions are italicized for easy reference.

The appellant International Bridge Company refused to pay the salaries of the customs inspectors unless their services were rendered in connection with the unlading of cargo. It is stipulated that no cargo is unladed by the International Railway Company at night, or on Sundays or holidays (International Record, Fol. 15). The Collector thereupon threatened to refuse to allow any conveyance to enter the United States across the public toll bridges of the appellant until application for a special license to unlade cargo had been made to him and a special license granted, and a bond in the sum of $50,000.00 filed by appellant International Railway Company with the Collector "condi-"tioned to indemnify and save the United "States harmless from any and all losses and lia-"bilities which may occur or be occasioned by "reason of the granting of such special license "* * * during a period of six months." (International Record, Fols. 16, 17, 19, 25).

*Statutes in Question.*

The first action (No. 340) was brought by International Railway Company against the Collecclector in the District Court of the United States for the Western District of New York to restrain the Collector from closing or attempting to close the bridges on Sundays and holidays, and from interfering with the free and fair passage of persons on foot or in vehicles, including trolley cars, across said bridges, except insofar as should be necessary for the inspection and collection of customs duties. Upon the argument of motion for temporary injunction and permanent injunction, the restraining order previously granted *ex parte* was dissolved, and the bill of complaint was dismissed for lack of equity (International Record, Fol. 32). The Bridge Company appealed to the United States Circuit Court of Appeals for the Second Circuit, and after argument that Court affirmed the decree dismissing the bill of complaint with an opinion (International Record, Fols. 43, 49).

An appeal to this Court was allowed May 19, 1921, by Mr. Justice Brandeis (International Record, Fol. 51). A petition for certiorari to the Circuit Court of Appeals, Second Circuit, verified May, 1921, has been duly filed and served; and motion thereupon was submitted November 14, 1921. By order of this Court the consideration of that motion was postponed until the hearing upon the appeals. An undertaking has been given by the bridge owner to pay the salaries of customs officers as demanded accruing since the commencement of this action in case of affirmance.

*Statutes in Question.*

Dr. Thomas Snyder brought the second action (No. 364) in equity in the District Court of the United States for the Western District of New York after the decision of the International Railway Company case by the Circuit Court of Appeals. Complainant there is a physician practicing in Canada and in the United States and is accustomed to using the bridges on Sundays and holidays in attending patients on both sides of the border. His practice is extensive and involves the continuous personal care of Dr. Snyder (Snyder Record, Fol. 3). The enforcement of the Collector's threats would compel Dr. Snyder to place his automobile and professional kit in pound if on a Sunday or holiday he travels from his practice in Canada to patients in Niagara Falls, N. Y. or returns from Canada to his home (Snyder Record, Fol. 5). He does not handle cargo (Snyder Record, Fol. 5).

The bill in the Snyder case asks judgment restraining the Collector and his officers from closing or attempting to close the bridges on Sundays or holidays, and from interfering with the complainant except insofar as shall be necessary for the immediate inspection and collection of customs duties whenever property is submitted unlocked and open for inspection, and, further, that the collector be restrained from refusing to permit complainant and persons similarly situated to cross the bridges in conveyances, and from endeavoring to enforce against the complainant and others similarly situated, the provisions of the

Act of Congress quoted. After argument the restraining order granted upon this bill and affidavits was dissolved and the bill of complaint was dismissed for lack of equity (Snyder Record Fol. 21). From that decree an appeal was allowed to this Court by the District Judge on June 8, 1921.

There were no issues in either case, answers never having been served. Further facts appear under the first point of this brief.

## Questions Involved.

The questions here involved are:

(a) Whether the acts and regulations of the Collector to enforce the statute were constitutional and lawful.

(b) Whether the statute may constitutionally and lawfully be applied to the appellants.

(c) Whether the statute must be interpreted as requiring payment of overtime salaries by the Department; with right of reimbursement in cargo cases only, and not in these cases.

(d) Whether the appellant International Railway Company, bridge owner, has any standing in equity to enjoin the acts and threats of the Collector.

(e) Whether this Court has jurisdiction of these appeals.

*Specification of Errors.*

These questions are raised by the final decrees dismissing the bills of complaint for lack of equity; and the appeals by International Railway Company from the affirmance thereof by the Circuit Court of Appeals, Second Circuit, and by Thomas Snyder directly to this Court from the final decree in his case.

## Specification of Errors.

1. Error was committed below in dismissing the bills for injunctive relief, because the threatened actions of the Collector and his regulations are unlawful and contrary to Article I, Section 8 of the Constitution of the United States, the jurisdiction of equity being undisputed.

2. It was error to dismiss the bills, because the acts and threats to apply the statute in question to appellants are contrary to the law, and would take appellants' property without due process of law, and would take the property of appellant International Railway Company for public use without just compensation.

3. The lower courts erred in denying injunctive relief because the coercive measures adopted are contrary to the statute which makes the salaries in question a government charge, to be recovered by the Collector, if at all, in an action at law.

4. The Circuit Court of Appeals, Second Circuit, and the District Court erred upon the facts,

and also in sustaining the unconstitutional and unlawful regulations promulgated by the Collector.

5. The Circuit Court of Appeals erred in its determination that the appellant International Railway Company had no standing to question the collector's unlawful regulations.

## POINT I.

### The threatened actions of the Collector of Customs were unconstitutional and contrary to law and should have been enjoined.

In the International Railway case there is a stipulated statement of facts under Equity Rule 77 and no issue was joined upon the complaints and affidavits in either case for the purposes of the motions to dismiss the bill. The averments, are therefore admitted.

The appellant International Railway Company owns two of the three bridges which cross the Canadian border from points in Niagara County, New York. These are public toll bridges. Customs inspection of the persons, packages and conveyances crossing these bridges has occurred since prior to 1900, and no charge was attempted to be made against the bridge owners for these inspections. The bridge owner, International Railway Company, operates a trolley car line

across both bridges. It does not handle cargo on Sundays or at night. No railroads are operated on its bridges. The traffic consists of pedestrians, passenger trolley cars and conveyances, horse-drawn or motor-driven.

The appellant Snyder is a physician who practices in Niagara Falls, New York, and Niagara Falls, Canada, and uses the bridges across the Canadian border with his automobile, carrying with him his professional bag, or physician's case. Many patients treated by him on both sides of the river are described in the bill, and their ailments are of such a nature that Dr. Snyder must have access to them on Sundays and holidays, and they require such personal attendance that no temporary substitution of physicians can be made with regard to their health. There is no adequate available means of access to these patients other than by automobile or horse drawn conveyance by the bridges for the purpose of the Doctor's professional calls. Dr. Snyder has been using the bridges at Niagara Falls professionally for many years on Sundays and holidays as well as at other times.

In June, 1920, the respondent Collector, demanded in writing (International Record, folio 14) that the International Railway Company appellant "pay two days' pay for each Sunday or "holiday for every customs officer performing "service in connection with your company. This "is a notice to you and you will be governed ac-

"cordingly." It was stated that this demand was made pursuant to the Act of Congress approved February 7, 1920, which has been set forth in full in the abstract of the case. It is stipulated that the International Railway Company "does not and has not unladed cargo or ship-"ments of freight or otherwise at night or on "Sundays or holidays," and has not applied for permission to do so. For this reason the appellant International Railway Company refused to pay the overtime charges demanded unless they were rendered in connection with the unlading of cargo.

Five months later the Collector, in writing, made the first of the threats which gave rise to the bill for injunction. He wrote:

> "The Honorable Secretary of the Treasury instructed me as follows:
>
> 'If the bridge companies refuse to pay for the service, no conveyance shall be permitted to enter the United States until 8:00 a. m. when the regular working day following a Sunday or holiday begins.'
>
> You are, therefore, hereby advised that I am this day instructing the Deputy Collector in charge at Niagara Falls to refuse to allow any conveyance to enter the United States across your bridges at Niagara Falls (Upper Bridge) or at Lewiston until you have complied strictly with the above mentioned Act—that is, until you have made application for a special license, special license granted by me, and you have filed a bond pursuant to the Act.
>
> These instructions become effective at midnight, December 4, 1920, when no cars or

other conveyance will be allowed to enter the United States until the following Monday morning at 8:00 a. m. * * * * Copy to Deputy Collector in charge, Niagara Falls, N. Y."

Thereupon the bill for injunction was filed by International Railway Company praying that the Collector be restrained from carrying out this threat.

Affidavits accompanied the bill, one of which set forth a verbal threat "to close the bridges of "the International Railway Company on Satur- "day night and keep them closed until Monday "morning." Answering and reply affidavits were filed which appear in synopsis, in the statement of facts (International Record, Fols. 21-30).

It appeared thereby that the entire course of the Collector was taken to compel the bridge owner to pay the salaries of United States Customs Inspectors for overtime work and to take out a license under bond as set forth in the statute quoted (International Record, Fols. 21, 25, 27, 28, 29). It appeared also that supplementing the order of November 27, 1920, detailed instructions were issued by the Collector, not so broad as the first order. It nowhere appears that the order and verbal threat for closing the bridges against all incoming conveyances has been abandoned. The detailed instructions follow:

"1. Trolleys may come in after full examination.

2. Trolley passengers may come in *after*

*surrendering all baggage and effects, to be examined after 8:00 a. m. on the day succeeding each Sunday or holiday.*

3. Foot passengers may come in after *surrendering all baggage and effects, to be examined after 8:00 a. m. on the day succeeding each Sunday or holiday.*

4. All vehicular passengers except trolley passengers may come in after surrendering all baggage and effects, to be examined after 8:00 a. m. on the day succeeding such Sunday or holiday. *All such vehicles will not be allowed to enter the United States until after their examination on the day succeeding each Sunday or holiday.*

5. All outgoing traffic may proceed as usual.

6. *There must be no examination of incoming passengers' baggage,* freight or merchandise, *no matter how small, including autos, teams and other vehicles* except trolleys.

7. *Any baggage left for examination by Customs officers will be held at owner's risk.*

8. You will use all reasonable means to advise all persons leaving the United States by way of bridges that there will be no examination of passengers' baggage and vehicles other than trolley cars until the day succeeding each Sunday or holiday.

9. You will understand that you are not to interfere with passenger traffic but must postpone all examinations until the day succeeding each Sunday or holiday.

10. These instructions are not confidential and may be shown to any interested party, and that such instructions were issued under orders of the United States Treasury Department, and as Collector of Customs." We have italicized the important clauses.

*Additional Facts.*

The uncontroverted bill in the Snyder case (Snyder Record, Fol. 4), reciting a part of these instructions states that the defendants unlawfully threatened to compel the complainant, Dr. Snyder, when crossing said bridges from Canada to the United States, to surrender to them his automobile and all baggage and envelopes therein contained until the morning of the first day following said Sunday or holiday whether or not the complainant submits his said automobile and baggage and envelopes therein contained for immediate inspection by the said defendants, and that it will be impossible for him to practice his profession in Niagara Falls, N. Y., without the automobile and baggage, and that Dr. Snyder has never carried cargo of any sort in his automobile and does not intend to carry cargo, and that the threat to impound his automobile is made without reference as to whether or not he carries cargo therein; and that he will suffer loss amounting to many thousands of dollars unless the Collector be restrained.

No answering affidavits were filed in the Snyder case so there is no dispute of fact. Both cases allege irreparable injury not compensable in money and damages incomputable, and no point was made in the lower court that equity did not have jurisdiction of the subject matter.

There are several threats by the Collector, one contained in the letter of November 27th first quoted above, which quotes the instructions from

the Treasury Department (International Record Fols. 16, 17); the second verbal; the third contained in the instructions to the Deputy Collector in charge at Niagara Falls, quoted in full above (International Record, Fols. 21, 22). The Collector, moreover, by affidavit stated his intention to employ a guard to "turn back automobiles, take "baggage for deposit and turn back passengers "who refused to deliver their baggage for exami- "nation the next day".

The Collector threatened to impound Dr. Snyder's automobile and professional baggage until the morning following any Sunday or holiday. This period of impoundment would equal 32 hours in some instances (12 o'clock midnight Saturday to 8 o'clock Monday morning) and at Christmas and New Years in 1920, 1921 and 1922 it might equal 56 hours. Without his automobile and instruments it is undisputed Dr. Snyder cannot practice his profession in Niagara Falls, N. Y. (Snyder Record, Fol. 5). The only adequate available means of access to his patients for the practice of Dr. Snyder's profession is by automobile or buggy across these bridges (Snyder Record, Fol. 2). The necessity for Dr. Snyder's personal attendance upon these patients is stated (Snyder Record, Fol. 3) and undisputed.

The Constitution by Article I, Section 8, has bestowed upon The Congress the power to lay and collect taxes, duties and imposts. The Col-

lector as an executive officer has no power except that given to him by the statutes.

*Barnes vs. P. & R. R. R. Co.*, 84 U. S., 294; 21 L. Ed. 544, The Collector in neither regulation nor action may add to the burden of those statutes nor diminish them. Any attempt to do so is unconstitutional.

> "The Secretary of the Treasury cannot, by his regulations, alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted. In the present case, we are entirely satisfied the regulation acted upon by the Collector was in excess of the power of the Secretary. The statute clearly includes animals of all classes. The regulation seeks to confine its operation to animals of 'superior stock'. This is manifestly an attempt to put into the body of the statute a limitation which Congress did not think it necessary to prescribe. Congress was willing to admit, duty free, all animals specially imported for breeding purposes; the Secretary thought this privilege should be confined to such animals as were adapted to the improvement of breeds already in the United States. In our opinion, the object of the Secretary could only be accomplished by an amendment of the law. That is not the office of a treasury regulation."
>
> *Morrill vs. Jones*, 106 U. S., 466; 27 L. Ed., 268.

"The regulation makes the presence of any coloring matter an absolute ground for exclusion. But the only grounds recognized by the statute are inferiority to the standard in purity, quality, and fitness for consumption,—words repeated over and over again in the act.

It cannot be made a rule of law that any tea that has an infinitesimal amount of innocuous coloring matter is inferior in those respects to a standard that has a much greater amount of other impurities and is worth only a quarter as much. All extraneous substances are impurities, and the presence of any may be detected in any way found efficient. But one such substance cannot be picked out and accorded supremacy in evil by an absolute (610) rule, irrespective of any harm that it may do. We go one step further and add that in view of the facts as to the standard and this tea, the presence of the Prussian blue affords no adequate ground for keeping the tea out.

The Secretary and the board must keep within the statute (Merritt v. Welsh, 104 U. S. 694, 26 L. Ed., 896), which goes to their jurisdiction (see Interstate Commerce Commission v. Northern P. R. Co., 216 U. S., 538, 544, 54 L. Ed., 608, 609, 30 Sup. Ct. Rep. 417), and we see no reason why the restriction should not be enforced by injunction, as it was, for instance, in Bacon v. Rutland R. Co., 232 U. S., 134, 58 L. Ed., 538, 34 Sup. Ct. Rep. 283; Philadelphia Co. v. Stimson, 223 U. S., 605, 620, 56 L. Ed., 570, 576, 32 Sup. Ct. Rep. 340; Santa Fe P. R. Co. v. Lane, 244 U. S., 492, 61 L. Ed., 1275, 37 Sup. Ct. Rep. 714. We are satisfied that no other remedy, if there is any other, will secure the plaintiff's rights."

*Waite v. Macy,* 246 U. S., 606, 62 L. Ed., 895.

"The Secretary of the Treasury is bound by the law, and although in the exercise of his discretion he may adopt necessary forms and modes of giving effect to the law, yet, neither he nor those who act under him, can dispense with, or alter any of its provisions."

*Tracy et al. v. Swartwout,* 10 Peters 80; 9 L. Ed., 354, 359.

*Particular Statutes Contravened.*

The Congress has spoken definitely and with nicety prescribed the conduct for the Collector in reference to the traffic here involved, and the regulations which he has adopted are contrary to the provisions of those statutes. This commerce has been given particular attention as "Com-"merce with Contiguous Countries". Revised Statute Sections 3095, *et seq.*, (Comp. Stat. §5807, *et seq.*) provide for such commerce and are exclusive. We particularly call attention to Section 3100 of the Revised Statute as amended by the Act of February 18, 1875, Chapter 80, § I, and by the Act of February 27, 1877, Chapter 69, §1 (Comp. Stat. §5812) as follows:

> "INSPECTION OF MERCHANDISE. All merchandise, and all baggage and effects of passengers, and all other articles imported into the United States from any contiguous foreign country, except as hereafter provided, as well as the vessels, cars, and other vehicles and envelopes in which the same shall be imported, shall be unladen in the presence of, and be inspected by, an inspector or other officer of the customs, at the first port of entry or custom-house in the United States where the same shall arrive; and to enable the proper officer thoroughly to discharge this duty, he may require the owner or his agent, or other person, having charge or possession of any trunk, traveling-bag, or sack, valise, or other envelope, or of any closed vessel, car, or other vehicle, to open the same, or to deliver to him the proper key."

This section is a requirement upon both the inspector and the traveler. The requirement upon the traveler is that the envelope shall be opened

in the presence of the inspector. The requirement upon the inspector is that the envelopes, when unladen and opened shall be inspected by him. There is no power here given to the inspector to hold the baggage for later inspection. Such power was purposely withheld. The right to hold baggage for later examination is expressly given by the next section, *only in the event that the traveler obstructs the inspection.*

> "R. S. Sec. 3101 (Comp. St. §5813) PENALTY FOR OBSTRUCTING INSPECTION.
>
> If any owner, agent, or other person shall refuse or neglect to comply with his demands, allowed by the preceding section, the officer shall retain such trunk, traveling-bag or sack, valise, or whatsoever it may be, and open the same, and, as soon thereafter as may be practicable, examine the contents; and if any article subject to the payment of duty shall be found therein, the whole contents, together with the envelope, shall be forfeited to the United States, and disposed of as the law provides in other similar cases. If any such dutiable merchandise or article shall be found in any such vessel, car, or other vehicle, the owner, agent, or other person in charge of which shall have refused to open the same or deliver the keys as herein provided, the same, together with the vessel, car, or other vehicle, shall be forfeited to the United States, and shall be held by such officer, to be disposed of as the law provides in other similar cases of forfeiture."

In this connection it is undisputed in the Snyder case that the defendants threatened to compel Dr. Snyder "to surrender to them his said automobile

"and all packages and envelopes therein contain-
"ed until the morning of the first day following
"said Sunday or holiday whether or not the com-
"plainant submits his said automobile and bag-
"gage and envelopes therein contained for imme-
"diate inspection by the said defendants."

The second section of the statute quoted makes it clear beyond a doubt that the Collector has no power to impound baggage except under certain conditions in that section specified, namely, obstruction of inspection by the passenger. All that is sought is to enjoin the Collector from refusing to inspect or trying to withhold Dr. Snyder's automobile and his professional kit and similar baggage and vehicles when presented open and unlocked for inspection.

The Collector's regulations would extend this "penalty for obstructing inspection" to the baggage of all persons who come into the United States on a Sunday or holiday whether they peacefully submit to inspection or not, whether their baggage is undutiable or not, and whether they present the same unlocked for inspection or not. The statute is penal and may not be enlarged by implication to embrace cases not within its terms.

*U. S. vs. One Pearl Necklace*, 111 Fed. 170.

It is submitted that the Collector can here no more extend this his right of withholding baggage for later inspection in cases of importation over

the Northern frontier than he could change the standards for tea importation as was endeavored in the case of *Waite v. Macy,* or establish standards of animals which may be imported for breeding as was attempted in the case of *Morrill v. Jones, supra.* Regulations to thus extend this statute are as invalid as the regulations of the Interior Department which added one affidavit to the requirements of the homestead laws:

*United States vs. George,* 228 U. S. 14; 57 L. Ed. 712.

They are more legislative than regulations which added clauses to affidavits required, for these regulations add penalties to those prescribed by Revised Statutes, Section 3102.

*Williamson vs. United States,* 207 U. S. 425; 52 L. Ed. 278.

This rule applies to the rules promulgated by subordinate officers as well as to the department regulations.

*United States vs. 200 Bbls. Whiskey,* 95 U. S. 571; 24 L. Ed. 491.

The statutes (Comp. Stat. §§5807, *et seq.*) quoted are exclusive so far as commerce with contiguous countries is concerned. Other commerce is governed by other specific regulations (Revised Statutes §§3059, 3061), different in many respects. There was obvious reason why a distinction should be made in the estimation of the Congress between commerce with contiguous foreign countries and commerce with nations more removed. These in-

land borders are crossed thousands of times each day by people who cross every day between their homes on the one side and their places of business on the other. Declarations of entry and the other formalities provided for other commerce would be out of place, impracticable and an unnecessary hardship under such circumstances.

The Congress has provided the means which shall be used for the collection of Customs duties in connection with such commerce as follows: (Comp. Stat.)

> "R. S. Sect. 3097. (Comp. St. §5809) Entry on the northern and northwestern frontiers. All vessels, boats, rafts, and carriages, of what kind soever, arriving in such districts, on the northern and northwestern frontiers, *containing merchandise, subject to duties*, on being imported into any port of the United States, shall be reported to the collector, or other chief officer of the customs at the port of entry in the district into which it shall be so imported; and *such merchandise* shall be accompanied with like manifests, and like entries shall be made, by the persons having charge of any such vessels, boats, rafts, and carriages, and by the owners or consignees of the merchandise laden on board the same: and the powers and duties of the officers of the customs shall be exercised and discharged in the districts last mentioned, in like manner as is prescribed in respect to merchandise imported in vessels from the sea; and generally *all such importations shall be subject to like regulations,* penalties, and forfeitures as in other districts, *except as hereinafter specially provided.*"

By this section, as we read it, the Congress has placed the burden upon the transporter to report

with a manifest "*dutiable merchandise*" only to the nearest Collector. "*Such importations*" and "*such merchandise*" are subject to the general stringent regulations pertaining to sea commerce. No attempt is made to compel the Collector to maintain inspectors at the bridge heads. He may maintain them under the provisions of Revised Statutes §§3100 and 3101 quoted. If he withdraws them any person with merchandise "subject to "duty" is obliged, under this statute, to report it to the Collector at the Port of entry and deliver a manifest of it to him. Penalties are provided by the statutes (Revised Statute §3099, Comp. Stat. §5811) for failing to give the manifest or avoiding the office of the Collector.

It follows of necessity that: By indicating that as to dutiable merchandise the general sections of the statute shall apply. The Congress has declared that as to baggage the general sections shall not apply in any event, and thus that Revised Statute §§3100 and 3101 (Comp. Stat. §§5812 and 5813) are exclusive. These sections being exclusive as to commerce with contiguous foreign countries, it follows that under no other section of the revenue laws applying to sea commerce can the Collector justify his regulations. This eliminates all references to sections referring to sea commerce, relied upon by the Collector below (Rev. Stat. §§2872, 2799, 3097) although it is believed that even were these sections applicable they do not justify the regulations and threats of the Collector.

*Collector Enlarges Burden of Statute.*

Sections 3100 and 3101 Revised Statutes, exclusive as to the baggage brought in over this northern frontier, permit and require the importer of such baggage must have it open for inspection, if inspection is desired by the Collector; and when the same is presented open for inspection it must be forthwith inspected and cannot be held for later inspection unless the importer is guilty of the obstructions mentioned in Revised Statutes §3101.

The Collector's regulations add the following provisions to the statute: Persons are not permitted to bring in baggage on Sundays and holidays and in the absence of inspection take it to the nearest Customs Collector's office, if it contains dutiable merchandise; and, if not, proceed without that formality, although the statute gives them that permission. The Collector decrees by his regulations that all baggage brought in under whatever circumstances whether unlocked and open for inspection or not must be left at the owner's risk in the Collector's pound until the Collector chooses to inspect it, and this whether it is dutiable or not. He would also add to the statutes that in order to obtain the immediate inspection provided by Section 3100 of the Revised Statutes, the importer of baggage which is not cargo, or a third party must give a bond and obtain a permit for the unlading of cargo, and pay Customs officers' fees, which are the conditions of such a permit for cargo unlading. He would also refuse admission to all vehicles, except trolleys, whether containing merchandise or baggage or neither.

*Collector's Unauthroized Control of Commerce.*

The Revised Statutes, §§3096, 3097, (Comp. Stat. §§5808, 5809), give the right to fair and free passage from contiguous countries to the northern and northwestern parts of the United States with merchandise which is not subject to duty, but the Collector has denied the right to such passage and asserted before the lower court (International Record, Fol. 26) that "there would "be a guard employed by the Customs service at "the American end of the bridge to turn back "automobiles, take baggage for deposit and turn "back passengers who refuse to deliver their "baggage for examination the next day after "8:00 A. M."

The Congress did not place any such burden upon this commerce. In fact according to the rules of statutory construction the Congress impliedly relieved this commerce from such burdens as the Collector would impose. Under the cases cited, the attempt of the Collector or the Treasury Department to place such burden on this commerce is unlawful and unconstitutional as an endeavor of an officer of the executive department to arrogate to himself powers given to the Congress by the constitution.

The Collector, in stationing a guard upon these bridges and turning back into Canada those persons who would not leave their vehicles and packages in pound until the day following a Sunday or holiday, has also arrogated to himself a control over commerce not given to him by the statute.

*Treaty Limitations Upon Restriction of Traffic.*

## SUPPLEMENTARY POINT I.

The traffic across these international bridges has been the subject of a treaty between the sovereign states on either side of the boundary. An examination of this treaty leads to the conclusion that not only has the Collector assumed a power over the traffic across this boundary unlawfully, because the power was not given to him by the Congress, but that his restrictions are contrary to a solemn treaty upon the subject. The treaty referred to is "The Treaty of Amity, Com-"merce and Navigation" (The Jay Treaty), promulgated in 1794 between Great Britain and the United States, and proclaimed by the President, February 29, 1796.

*Mallory, Treaties, Conventions, etc.,* Vol. 1. p. 590.

Despite the war of 1812, this treaty is still in force and effect.

*Society for Propagation of Gospel vs. New Haven,* 8 Wheaton 464; 5 L. Ed. 662; 21 U. S. 464.

We have italicized in the following quotation the provisions which we deem pertinent.

"It is agreed that *it shall at all times be free to His Majesty's subjects, and to the citizens of the United States,* and also to the Indians dwelling on either side of the said boundary line *freely to pass and repass by land or inland navigation, into the respective territories and countries of the two parties, on the continent of America,* (the country within the limits of the Hudson's Bay Company only excepted), and to navigate all the lakes,

rivers and waters thereof and freely to carry on trade and commerce with each other. But *it is understood that this article does not extend to the admission of vessels* of the United States into the sea-ports, harbours, bays or creeks of His Majesty's said territories; nor into such parts of the rivers in His Majesty's said territories as are between the mouth thereof, and the highest port of entry from the sea, except in small vessels trading *bona fide* between Montreal and Quebec, under such regulations as shall be established to prevent the possibility of any frauds in this respect. Nor to the admission of British vessels from the sea into the rivers of the United States, beyond the highest ports of entry for foreign vessels from the sea. The river Mississippi shall, however, according to the treaty of peace, be entirely open to both parties; and it is further agreed, that all the ports and places on its eastern side, to whichsoever of the parties belonging, may freely be resorted to and used by both parties, in as ample a manner as any of the Atlantic ports or places of the United States, or any of the ports or places of His Majesty in Great Britain.

All goods and merchandize whose importation into His Majesty's said territories in America shall not be entirely prohibited may freely, for the purpose of commerce, be carried into the same in the manner aforesaid, by the citizens of the United States, and such goods and merchandize shall be subject to no higher or other duties than would be payable by His Majesty's subjects on the importation of the same from Europe into the said territories. And in like manner *all goods and merchandize whose importation into the United States shall not be wholly prohibited, may freely, for the purposes of commerce, be carried into the same*, in the manner aforesaid, by His Majesty's subjects, and such goods and merchandize shall be subject to no

> higher or other duties than would be payable by the citizens of the United States on the importation of the same in American vessels into the Atlantic ports of the said States. And *all goods not prohibited to be exported from the said territories respectively, may in like manner be carried out of the same by the two parties respectively paying duties as aforesaid.* * * * *
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> As this article is intended to render in a great degree the local advantages of each party common to both, and thereby to promote a disposition favorable to friendship and good neighborhood, it is agreed that the respective governments will mutually promote this amicable intercourse, by causing speedy and impartial justice to be done and necessary protection to be extended to all who may be concerned therein."

We submit that, in the face of this right of free passage and repassage and of free importation, the Collector has no power to impose restrictions that: (a) no person may pass on Sundays and holidays except on foot; (b) no vehicle may enter on Sundays and holidays except trolley cars; (c) no person may enter on a Sunday or holiday, without surrendering all baggage "however small"; (d) no goods, merchandise, baggage, or effects may be carried into the United States on Sundays or holidays.

The word "freely" used in the treaty is more than an incidental adverb. It is the substance of the article for the promotion of "friendship and good neighborhood". It has been defined as fol-

lows: "In a free manner; under free conditions; "with freedom; without hindrance, interference, "or restraint; as to move freely." (Century Dictionary.) The Collector's acts in this regard must be regarded as imposing hindrance, interference and restraint, and, therefore, as interfering with the free movement provided by the treaty; consequently, as unlawful and void.

The distinction between this inland traffic and sea commerce by vessel is clearly made by the treaty; and justifies the construction sought, which refuses the extension by implication of provisions enacted originally to apply to vessel owners only to cover traffic on inland bridges.

*Collector's Unauthorized Control of Commerce.*

The Congress is given power to regulate commerce with foreign countries, by Article I, Section 8 of the Constitution. It is admitted that the Congress in the exercise of the power given to it to regulate commerce with foreign countries, could, if it wished, establish a police force to control and even stop the traffic on such international highways as these bridges. The court will take judicial notice of the fact that there are many international highways along the northern border which cross the line between the United States and Canada. Strict search does not disclose that the Congress by legislation has provided for such regulation.

The grant to the Congress of the power by the constitution, denies the power to executive departments except by Act of Congress; and there can be no justification for an assumption of a power given to the Congress by an executive officer merely because the Congress has not chosen to exercise it.

It has been contended that the Collector as an officer of the Treasury Department is granted this power by implication in connection with his other duties. But such a power of embargo upon international highways is not incident to the inspection of goods and the collection of Customs duties. The Collector may provide sufficient inspectors at sufficient points upon this border to accurately and continuously appraise the Treasury Department of the amount and nature of all

dutiable goods which cross it and ensure the collection of the revenue. But he cannot stop all traffic on these roads because his force is inadequate. We have referred to the fact that these bridges constitute highways and they must be treated like all other highways even though traffic upon them is under private control.

The Collector has been expressly given many powers with reference to commerce including traffic across the borders from the United States such as: power to issue process and arrest persons interfering with navigation (Act Mar. 3, 1899, Ch. 425, §17; Comp. Stat. §9922); to receive and request information as to collisions (Act June 20, 1874, Ch. 344, §10; Comp. Stat. §7975); power to prevent importation of adulterated drugs (Rev. St. §2612; Comp. Stat. §5356); to record assignment of vessels of foreign register and to measure and describe such vessels for registry (Act May 10, 1892 Ch. 63; Comp. Stat. §§7711, 7712); to issue certificates to Chinese laborers providing for their return to this country (Act Sept. 13, 1888, ch. 1015; Comp. Stat. §4308) and to receive passenger lists and to compare them with such certificates; to receive and record certificates of inspection of steamships (Rev. St. §4421 as amended; Comp. Stat. §8182); to act as shipping commissioner (Rev. St. §4503; Comp. Stat. §8289); to detain armed vessels loaded with munitions of war (Crim. Code §17; Comp. Stat, §10181); to receive bills of health of vessels (Act Feb. 15, 1893, ch. 114; Comp. Stat. §9160);

to receive the payment of penalties from vessel owners (Act Feb. 20, 1907 ch. 1134; Comp. Stat. §4262); to superintend lighthouses (Rev. St. §4672; Comp. Stat. §8445); to cause a muster of the crew of any vessel to be made to determine whether the acts respecting merchant seamen have been satisfied (Act Mar. 4, 1915 ch. 153; Comp. Stat. §8363a); to receive head taxes of alien immigrants (Act Feb. 20, 1907 ch. 1134; Comp. Stat. §4242); to enforce regulations of radio communication and to issue temporary permits to radio telegraphers (Act Aug. 13, 1912 ch. 287; Comp. Stat. §10102); to register and license vessels (Revised St. §4141; Comp Stat. §7719); to require that all vessels be furnished with proper signal lights (Act Feb. 18, 1895 ch. 102; Comp. Stat. §7973); to enforce the statutes regulating steam vessels (Revised St. sec. 4496; Comp. Stat. §8272); to assist in the protection in commerce of trade marks (Act Feb. 20, 1905 sec. 592; Comp. Stat. §9513); to receive and report information for privateers' pensions (Rev. St. §4763; Comp. Stat. §9095); to make inspections and enforce provisions referring to vessel accommodation for passengers (Act Aug. 2, 1882 ch. 374; Comp. Stat. §8012). Additional powers are given to particular collectors such as the Collector in Alaska who is empowered to arrest persons and seize vessels committing offenses against fur seals (Rev. St. §1957; Comp. Stat. §8851), and to enforce the game laws in Alaska (Act May 11, 1908, ch. 162; Comp. Stat.

§3621); while the Customs Collectors at Astoria, Camden, Wilmington, Jersey City and Chesapeake City have been given other special powers in connection with commerce. (Rev. St. §4304, *et seq*; Comp Stat.. § 8089 *et seq.*).

But no where has the Collector been specifically granted the power of traffic police to inhibit traffic into the United States on international highways. Because the Congress has given him so many powers specifically it must be clear that this power not specifically given cannot be added to his office by implication. No statute giving the Collector or the Secretary of the Treasury any control over the highways or bridges was indicated below; nor can we find that such control has been given to any executive department specifically.

If it is to be attached to any executive department by implication, it would seem that the power over international highways must belong to the Department of Commerce; and that over bridges to the same department or to the Department of War. We believe, however, that neither of these departments, nor the Department of the Treasury has any such power either by statute or implication and that the control over commerce so far as international highways are concerned, remains still in the Congress to be the subject of enactment when the Congressional prerogative thereupon shall be exercised. Until Congress acts to give the control of international highways to some department or to provide for police control in some other way, no department can arrogate to itself

the power of Congress and stop traffic upon such international highways by means of a guard or otherwise.

The embargo on the bridges by the Collector is therefore an infringement by this executive officer of a Congressional power not delegated to him and is unconstitutional as well as unlawful.

The Collector by his regulations and his threats would, therefore, add burdens to the statutes, not contained therein and would also assume a power not given to him, and these attempts should have been enjoined, aside from the application of the statute to appellants.

## POINT II.

**To apply the statute in question to appellants is unlawful, unconstitutional and confiscatory.**

The Collector seeks to compel appellants or one of them to furnish a $50,000.00 bond of indemnity and to pay customs inspectors' salaries pursuant to a statute which does not apply to appellants or their operations.

The statute was passed and approved February 13, 1911, and related to the unlading or lading of cargo at night. Sections 1-4 have not been changed by the Amendment of 1920 and still relate only to

the lading and unlading of cargo at night. It is these first four sections which prescribe the conditions under which a special license or permit must be sought and granted. These special licenses and permits are only to permit the unlading of cargo and not for any other purpose. There never has been any provision in the Statute of February 13, 1911, which provided for a special license to unlade baggage unless it can be inferred from the Amendment of February 7, 1920, and that is not feasible. The Statute of 1911 was not the original statute providing for licenses for unlading. The Act was first passed as Section 2871 of the Revised Statutes which was amended by the Acts of June 5, 1894, Chapter 92, and of May 31, 1900, Chapter 600. All of these applied to vessels only. In 1906 the term "vessels" was enlarged by the inclusion in the statute wherever it occurred of the amending phrase "or other convey-"ances," so that the statute then applied to "ves-"sels or other conveyances."

This was done to extend the provisions to include the "unlading of imported merchandise from *freight cars,*" a "cargo" operation. (Congressional Conference Report, Snyder Record, Fol. 16, page 12).

The statute was never expanded to include or require special licenses or special bonds for any other process than the "lading or unlading of car-"go at night or on Sundays or holidays," unless that was done by the amendment of February 13,

*The Amendment of 1920.*

1920. The application of the statute to cargo only was not enlarged by the amendment of February 7, 1920. For the convenience of the court we are reproducing the amendment as accomplished by that statute. The phrases omitted are bracketed and in black-faced type. The new phrases are in italics. That part of the statute which remains unchanged is in ordinary type.

"COMPENSATION [**OF INSPECTORS, ETC.**], FOR [**NIGHT**] *OVERTIME* SERVICES: BOARDING OFFICERS MAY ADMINISTER OATHS: *FIXING WORKING HOURS.*

The Secretary of the Treasury shall fix a reasonable rate of extra compensation for [**night**] *overtime* services of inspectors, storekeepers, weighers, and other customs officers and employees *who may be required to remain on duty between the hours of five o'clock postmeridian and eight o'clock ante meridian, or on Sundays or holidays, to perform services* in connection with the lading or unlading of cargo [**at night**], or the lading [**at night**] of cargo or merchandise for transportation in bond or for exportation in bond or for [**the**]exportation with benefit of drawback, *or in connection with the receiving or delivery of cargo on or from the wharf, or in connection with the unlading, receiving, or examination of passengers' baggage,* [**but such rate of compensation shall not exceed an amount equal to double the rate of compensation allowed to each such officer or employee for like services rendered by day**] *such rates to be fixed on the basis of one-half day's additional pay for each two hours or fraction thereof of at least one hour that the overtime extends beyond five o'clock postmeridian (but not to exceed two and one-half days' pay for the full period*

*from five o'clock postmeridian to eight o'clock antemeridian), and two additional days' pay for Sunday or holiday duty.* [,] The said extra compensation *shall* [**to**] be paid by the master, owner, agent, or consignee of such vessel or other conveyance whenever such special license or permit for immediate lading or unlading or for lading or unlading at night or on Sundays or holidays shall be granted to the collector of customs, who shall pay the same to the several customs officers and employees entitled thereto according to the rates fixed therefor by the Secretary of the Treasury. *Provided that such extra compensation shall be paid if such officers or employees have been ordered to report for duty and have so reported, whether the actual lading, unlading, receiving, delivery, or examination takes place or not.* Customs officers acting as boarding officers and any customs officer who may be designated for that purpose by the collector of customs are hereby authorized to administer the oath or affirmation herein provided for, and such boarding officers shall be allowed extra compensation for services in boarding vessels at night or on Sundays or holidays at the rates prescribed by the Secretary of the Treasury as herein provided, the said extra compensation to be paid by the master, owner, agent, or consignee of such vessel: *Provided further, that in those ports where customary working hours are other than those hereinabove mentioned, the Collector of Customs is vested with authority to regulate the hours of customs employees so as to agree with prevailing working hours in said ports, but nothing contained in this proviso shall be construed in any manner to affect or alter the length of a working day for customs employees or the overtime pay herein fixed."*

*Burden on Cargo Carriers Only.*

The original act of Feb. 13, 1911, did not apply to baggage passengers nor public toll bridges. It applied only to cargo vessels and freight cars. Sections 1-4 of that act still have no application to anything but cargo. Special licenses are granted only in cargo cases. It is stipulated that appellants do not handle any cargo or shipments of freight on Sundays or holidays.

It will be observed that by the amendment of the statute it is provided that the Secretary of the Treasury shall fix extra compensation for employees who work overtime not only upon cargo and bonded merchandise but upon baggage. The phrase "the Secretary of the Treasury shall fix a "reasonable rate of extra compensation, etc.," means, as we shall show under Point III, that the Secretary of the Treasury shall fix *and shall cause to be paid* the extra compensation. However, it is specifically provided—and this provision has not been changed by the amendment—that in one event the master, owner, agent or consignee of a vessel shall pay the extra compensation and in one event only. That event is "whenever such "special license or permit for immediate lading "or unlading, or for lading or unlading at night "or on Sundays or holidays, shall be granted." Then, and in that event only, is there a special requirement that the salaries of the United States officials who inspect merchandise shall be paid by anyone except the Department.

In the consideration of a statute which provides that salaries of government officers shall be

paid by the persons against whom those officers are required to protect the government; involving the grave question of public policy arising out of the temptation to fraud occasioned thereby, the court must be loath to extend the purview by implication. It may be that the statute is so contrary to public policy as to require the court to interfere with the legislative policy which adopted it; but certainly it is fraught with grave danger to the revenue by the connivance of inspectors at the payment of unearned overtime salaries and should not be extended beyond its express terms.

The provision for compensation has been extended to cover passengers' baggage inspection. The provision for reimbursement by importer has not been extended beyond its original scope. It provides for reimbursement only where cargo is concerned, and then only when cargo was unloaded under special license.

The words "such special license or permit for "immediate lading or unlading, etc.," can refer only to the four preceding sections of the same statute which remain unamended, which provide for special licenses and permits for the lading and unlading of cargo. There is no other provision in the entire statute for special licenses or permits. The special license referred to applies, therefore, only to cases involving cargo, and the liability which follows a special license is a liability attaching only to the masters, owners, agents and consignees of vessels or conveyances handling cargo.

*Burden on Cargo Carriers Only.*

It is stipulated in the International Railway case and undisputed in the Snyder case that the International Railway Company "does not and "has not unladed cargo or shipments of freight or "otherwise at night or on Sundays or holidays" (International Record, Fol. 15), and that Dr. Snyder "has never carried cargo of any sort in "said automobile and does not intend to carry "cargo of any sort, and the threats of the said "George G. Davidson, Jr., are made without ref- "erence to the carrying of cargo by your peti- "tioner in his said automobile or baggage or en- "velopes therein."

Although it is stipulated and undisputed that no cargo is unladed by the International Railway Company on Sundays or holidays, or handled by Dr. Snyder at any time, the Collector has demanded the International Railway Company bridge owner, obtain one of these special licenses for unlading cargo, give a $50,000.00 bond of indemnity for operations thereunder, and the payment of inspectors' salaries for government service as a condition that any conveyance, except trolley cars, shall be allowed to use the bridges, and that any baggage or packages "however "small" may be carried into the United States over these bridges on Sundays or holidays whether open and presented for custom inspection or not.

To hold that the phrase "unloading of cargo" includes the operations on appellant's bridges

covered by the collector's rules, is to declare that a handbag is cargo, a lady's purse contains cargo, a man's wallet contains cargo, because those rules provide for impounding "all incoming pas- "sengers' baggage, freight or merchandise, no "matter how small," indeed, that the conveyances crossing the bridge constitute their own cargo. It is stipulated that no freight shipments are involved here, and the collector's rules apply to baggage only.

The whole reason and philosophy of the statute show the distinction between cargo and passengers' baggage. A freight carload imported would be presumably dutiable. Baggage of passengers, from the minimum of toothbrush and pajamas, to the maximum, being an accompaniment of persons traveling, would be presumably be non-du tiable. Customs revenue is collected on "im- "ports" in the main, and these imports are usually freight or laded merchandise. That minor smuggling is detected in baggage does not change the prime fact that it would be ordinary prudence to demand a bond before unloading freight or cargo at night, and that it would be an unreasonable requirement to demand a bond so that a passenger at night, on Sunday or a holiday, across the Canadian border, could leave the border town with his baggage shortly after his arrival. This was the obvious legislative intention.

It would be particularly unreasonable to demand such a bond from the owner of the conduit

through which the passenger travels, unannounced, and unknown, and thereby compel the bridge owner to save harmless the government "from any and all losses and liabilities" by reason of Sunday or holiday traffic.

The cargo of a conveyance or vessel is its lading whereas baggage is an incidental accompaniment upon a vessel or conveyance, whose principal lading is people. So far as passengers' baggage is concerned, it is not mentioned Secs. 1-4 of the Act of Feb. 13, 1911 (Comp. St. Sec. 5559), which has to do with special licenses. The license is granted under this statute only after advance notice of entry and the payment of overtime is conditioned upon the license. Upon a public toll bridge passengers come and go. Their number cannot be determined in advance. Their names, and the character of their baggage or its contents, are unknown, and advance notice to the collector is impossible. Neither are the vehicles which cross the bridges, cargo. Their number and value in content cannot be known in advance of their presenting themselves for crossing. No preliminary report can be made of their arrival, in the ordinary practice, before they reach the end of the bridge. Such a report could easily be made of cargo in transit by a vessel or conveyance, after its transportation had commenced, and before it was presented for import.

The original act of March 2, 1799, contained a plan for treatment of passengers' baggage, en-

tirely apart from freight, and this distinction has been maintained through all the amendments of the statutes to date. Unlading permits were granted for the handling of baggage (Sec. 46 which became R. S. §2531-2537, since superseded), but by entirely different sections and different provisions from permits for the ordinary unlading of freight. (Secs. 27 and 28). The baggage sections are now Secs. 2799-2803 Revised Statutes (Comp. St. Secs. 5496-5499), and the freight provisions are now Secs. 2869-2874 Revised Statutes (Compiled Statutes Secs. 5557-5565).

> "CARGO. A word of large import, susceptible of different meanings, and defined as the lading of a ship or vessel; the lading or freight of a ship; the goods, merchandise, or whatever is conveyed in a ship or other merchant vessel; the merchandise or wares contained and conveyed in a ship or vessel. Generally the term, unless there is something in the context to give it a different signification, means the entire load of the ship which carries it, and *prima facie*, and in its ordinary and natural meaning, refers to goods only."
> 9 *Corpus Juris*, 1292,

citing:

> *U. S. v. Dewey*, 188 U. S., 254; 47 L. Ed., 463,

where Mr. Justice Fuller said:

> "Cargo is the lading of a ship or vessel, and may be prize when the vessel is not, or the vessel may be when the cargo is not."

The Act of February 13, 1911, applies to freight and loaded merchandise only, as is indicated in the opening words of the first of these sections.

"If, after the arrival of any vessel *laden with "merchandise,*" etc.; and similar phrases throughout the statute, which we have italicized above.

> "All articles coming from foreign countries may be divided into two great classes—those which are imported as merchandise, and those which are brought in as the baggage and personal effects of passengers. Two different systems are provided for these different classes. Sections 2785, 2872, 2874 and 2963, (U. S. Comp. St. 1901, pp. 1867, 1910, 1946), and sections 3 and 4 of the Customs Administrative Act of June 10, 1890, c. 407, 26 Stat. 131 (U. S. Comp. St. 1901, pp. 1887, 1888), regulate the importation of merchandise, with elaborate provisions about invoices, bills of lading, consular certificates from the country whence imported, etc. In the case of passengers' baggage, however, a much less complicated and more expeditious system is provided for, in sections 2799, 2801, and 2802 (U. S. Comp. St. 1901, pp. 1872, 1873), and the regulations, which will be found fully set forth in the opinion in the Dodge Case."
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> *One Pearl Chain v. U. S.*, 123 Fed., 371.
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> *Loose Emeralds v. U. S.*, 154 Fed., 839.
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> *U. S. vs. One Pearl Necklace*, 111 Fed. 164, 169.

The Acting Attorney General of the United States in March 3, 1913, construing the same statute reached the conclusion that the word "cargo" therein did not include passengers' baggage, and therefore the officers inspecting passengers' baggage were not entitled to extra compensation as were the officers inspecting cargo.

*30 Opinions, U. S. Attorney General* page 123.

The statute has been amended so that the inspectors of passengers' baggage can also obtain compensation, but it has not been amended so that the extra compensation may be obtained from anyone but the owners, masters, agents or consignees of cargo carriers because it is provided that that liability shall attach only when a special license for unlading cargo is required. The Collector has endeavored to require such a license from the appellants although they do not unlade cargo at night or on Sundays or holidays. The statute cannot be so applied lawfully.

Again the Collector has endeavored to compel appellant, International Railway Company, to bear a burden laid by statute upon vessels or other conveyances only. We have shown that this includes cargo conveyances only (Snyder Record, Fol. 15, Congressional Report).

The bridges of the appellant, International Railway Company are neither vessels nor conveyances of cargo or otherwise within the meaning of the statute. Even if the handbags and the automobiles and the trolley cars were cargo, and if, as the Collector contends, submission to inspection constitutes an unlading of that cargo, to require a special license therefor; nevertheless, the appellant is not obliged to pay for the services of customs inspectors under the Act of February 7, 1920, because that provision applies only to the "master, owner, agent or consignee *of such vessel "or other conveyance.*"

It will not be claimed that appellant is either a consignee, a master of a vessel, or the owner of a vessel, nor the consignee of the conveyances coming over the bridge, nor is it the owner of any of the conveyances except the passenger trolley cars which cross its toll bridges.

Some point was made below that because the International Railway Company runs trolley cars over its bridges, therefore, the provisions for licensing it to lade and unlade at night are applicable to that company as the owner of a conveyance. It is stipulated that no cargo, freight or merchandise is handled or unladed at night, on Sundays or holidays, and it will be further noticed that by the rules which the Collector issued, the only part of the vehicular operation upon the bridges of the International Railway Company not affected which was allowed to continue despite the failure of the bridge company to obtain a special license was that part which had to do with trolley cars. This was, of course, for the obvious reason that while automobiles and baggage could be impounded, trolley cars could not be conveniently impounded, and the force of circumstances compelled the Collector to forego this means of coercion. But since they are not made the subject of inhibition they cannot be made the excuse for the application of the statute to the International Railway Company.

The bridges are not conveyances. They are mere conduits of traffic. We call the court's at-

tention to the definitions of the Century Dictionary:

> "Conveyance: (3). That by which anything is carried or borne along; an instrument of transportation from one place to another, specifically a carriage or coach; a vehicle of any kind."
>
> "Bridge: (1) Any structure which spans a body of water or a valley road and the like and affords passage or conveyance."

Bridges are held to be real estate, and this bridge has been so held to be real estate.

> *Niagara Falls-Suspension Bridge Co. v. Gardner,* 29 U. C. Q. B., 194.
>
> "Public bridges have been defined by an able lexicographer to be such as form a part of the highway according to their character, as foot, horse or carriage bridges, for the accommodation of the public generally. This definition is borne out by the decisions which universally hold that public bridges, including the approaches thereto, are a part of the highway which passes over it, except where the language of some particular statute is such as to show plainly that the term herewith is not intended to include bridges, and the rule applies where the bridge is owned by the public or by a private corporation, authorized to demand tolls for passage over it."
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> 9 *Corpus Juris,* p. 422, Sec. 2.

"Conveyance" in an insurance policy against accident "while traveling by public or private con- "veyance imports traveling by some vehicle other "than the legs of a man walking and carrying his "own body, as a car, vessel, stage, or by one's own "or another's team."

*Burden on Cargo Carriers Only.*

*Ripley v. Railway Passengers' Assurance Co.*, 21 Fed. Cases, 823, 829.

It is evident that the Collector would lay upon the appellants who do not, by the stipulations of this case and the law as cited, unlade cargo, the burden of a statute which by its terms must fall only upon those who do unlade cargo under special license therefor. He would also impose upon them a burden not authorized by any statute, under the pretense of applying to them a statute which by its terms applies only to "the master, owner, agent "or consignee of such vessel or other conveyance" of cargo. That this was the limitation of the phrase in the conception of the Congress there can be no doubt after reading the report of the Conference Committee and the statement of the Managers on the part of the House of Representatives, considering the amendment which added the words "or other conveyances" to the statute (Snyder Record, Fol. 15). It is clear that the sole intention was to extend the provisions for the unlading of cargo to the only cargo carriers upon railroads, to-wit: freight cars; and not to include other conveyances, nor to include by implication in the phrase "the lading or unlading of "cargo" words to import the handling of baggage.

Thus the Collector would compel the appellants to pay overtime salaries and give a bond, which the statutes do not require. This constitutes an unconstitutional extension of the statute by regulation and unlawful action, and it is unconstitu-

tional under Article I, Section 8, as has been shown.

The Collector in his official capacity, under the guise of applying a statute which is not applicable, takes the property of either or both appellants—takes their money for the payment of government salaries and a large bond of indemnity, and deprives Dr. Snyder and others similarly situated of the use of conveyances and baggage for a period ranging to a possible fifty-six hours. The bill in the Snyder case (Snyder Record, Fols. 1-7) indicates that in that case the appellant is thereby deprived for that period of the necessary implements of his profession rendering it "impos-"sible for the complainant to practice his profes-"sion in the City of Niagara Falls, N. Y." for that period of time. If so much can be done under the statute, there is nothing to prevent the Collector from depriving the Doctor and others of similar property any and every night, because the terms of the statute extend as well to night-time as to Sundays and holidays.

This deprivation is not authorized by any law. Hence there can be in it no due process of law. There is no statute, no hearing, no judicial determination, no right of appeal. The actions threatened by the Collector would, therefore, contravene the Fifth Amendment to the United States Constitution; for the appellants will be as much deprived of their property by the unlawful official acts of the Collector as by an unconstitutional statute.

*The Fifth Amendment.*

*Home Tel. & Tel. Co. vs. Los Angeles*, 227 U. S., 278; 57 L. Ed., 510.

To thus compel the appellant International Railway Company, the owner of the conduit of traffic, to pay the salaries of government inspectors for services rendered to miscellaneous persons, passengers upon its bridges, and to indemnify the Government in the sum of $50,000.00 against the unlawful acts of such persons in any six months is certainly to take the private property of the bridge owner for public use. We forbear to cite cases that the payment of government salaries is a public use of the money of the bridge owner. Not only is such appropriation of the funds of this appellant unlawful, as shown. It is also unconstitutional under the Fifth Amendment unless just compensation is made therefor. Some of the lower courts have held that such compensation must be in money only.

*Vanhorne's Lesee vs. Dorrance*, 28 Fed. Cas., No. 16,857; 1 L. Ed., 391.

This would seem to reduce the question to the absurdity of requiring repayment in money for the money taken.

To consider the views offered below, the International Railway Company, bridge-owner, does not receive just compensation for this property taken by permission given to continue to receive vehicular tolls on Sundays and holidays. It has the lawful right to these tolls; and the Collector's interference with them is unlawful, as shown.

Compensation for the property taken must be a *quid pro quo.*

*12 Corpus Juris,* 230.

Mere permission to receive that which it is already lawfully entitled to have, and to carry on a business which is its lawful right, is no compensation or consideration for the property taken. Compensation must be the full equivalent of the property taken:

*Monongahela N. Co. v. United States,* 148 U. S., 312; 37 L. Ed., 463.

To contend that the permission to the bridge-owner to continue to receive tolls is a full equivalent or just compensation for the taking of its property to the extent of more than three thousand dollars a year (International Record, Fol. 53) is vain; because that right to tolls is such a vested interest that it could not be taken from the appellant bridge-owner without just compensation.

*Belleville vs. St. Clair County Turnpike Co.,* 234 Ill., 428, 17 L. R. A. (NS) 1071.

If, on the other hand, it be contended that this taking of the money of the bridge-owner was not for public use, inasmuch as the ultimate payees thereof were private individuals (despite the fact that the payment to them is for their official salaries); such a taking contravenes the clause providing for due process of law, and is unconstitutional.

*Overtime Salaries Government Expense.*

*Ochoa vs. Hernandez y Moralez,* 230 U. S., 139; 59 L. Ed., 1423.
*Chicago &c. R. R. Co. vs. Wisconsin,* 238 U. S., 491; 59 L. Ed., 1423.

## POINT III.

**The statute contemplates government payment of overtime salaries, except in cargo cases.**

It is stipulated that the appellant requested the Government to forego coercive methods of enforcing this statute against the appellant and to bring suit at law for reimbursement for salaries paid for overtime services of Government inspectors. The Collector contended it was not the intentment of the statute that he should do so (International Record, folio 29).

The statute which requires that the "Secretary "of the Treasury shall fix a rate of extra compen- "sation, etc.," must be interpreted "The Secre- "tary of the Treasury shall fix *and shall pay the "salaries, etc."* This construction is demanded by an examination of the entire Customs statute. There is nowhere in the entire statute any express provision that salaries shall be paid to any employee, aside from the collectors. Throughout the statute provisions for the payment of salaries are made in this same way—that "the Secretary "of the Treasury shall fix the salary," the provision for payment being implied. This applies

to the employees in the appraiser's office in the Port of Boston, (R. S., Sec. 2530, Compiled Statutes, Sec. 5329); the employees in the appraiser's office in the Port of Philadelphia (R. S., Sec. 2545, Compiled Statutes, Sec. 5333).

Similarly, by the Act of March 4, 1911, Chap. 285, (Sec. 5390, Compiled Statutes) a provision is made for the fixing of compensation for special agents by the Secretary of the Treasury.

Moreover, by so recent an act as that of March 24, 1920, (Compiled Statute, Sec. 5327c) it was ordained "that the Secretary of the Treasury be "and he is hereby authorized to fix the compensa- "tion of temporary laborers in the customs serv- "ice," without any provision that compensation so fixed should be paid. It follows that if the customs inspectors here are not entitled to their pay from the Government, primarily, neither are the appraisers' clerks in Boston and Philadelphia entitled to their pay, nor are the special agents nor temporary laborers entitled to the compensation fixed for them. There is no provision for payment in any of these cases.

The Department is required to pay the customs collectors for this over-time service. That was the intention of the Congress in allowing the Secretary to fix the compensation, just as it was the intention in directing the Secretary to fix the compensation for temporary laborers and appraisers' clerks.

It is therefore apparent that, in order to equalize the pay of the employees of the Department, in view of the condition revealed in the opinion of the Attorney General cited,

30 *Opinions, Attorney General,* page 123,

the Congress passed the amendment of February 7th, 1920. The situation as outlined in the Opinion of the Attorney General reveals that customs employees inspecting passengers' baggage were not receiving the overtime pay of those who inspected cargo vessels at night, on Sundays or holidays. An interpretation of the statute was sought to enable baggage inspectors to receive overtime pay as cargo inspectors did. The Attorney General ruled against such an interpretation.

As stated in the brief for the Collector in the lower court, "This opinion evidently gave rise "to the amendment above quoted." The Congress evidently determined that the Government should equalize this discrimination among its employes, and, in the same phrase in which it has always provided for the payment of customs employes, it directed the Secretary of the Treasury to fix (and to pay) extra compensation to employes "who may be required to remain on duty "between the hours of five o'clock postmeridian "and eight o'clock antemeridian, or on Sundays "or holidays, to perform services in connection "with the lading or unlading of cargo, or the lad-"ing of cargo or merchandise for transportation "in bond or for exportation in bond, or for ex-"portation with benefit of drawback, or in con-

"nection with the receiving or delivery of cargo "on or from the wharf, or in connection with the "unlading, receiving or examination of passen- "gers' baggage, etc." It was thus provided that the government should make all equal in overtime pay, and that discriminations prevailing should be eliminated.

But the payment of the extra compensation by any other than the Government was not extended by the amendment. The provision that the person who wished to quickly discharge cargo under a special license should pay for the service occasioned by his haste was continued, and was not extended. Such cargo might well await the business hours of the office of the collector. Baggage, on the other hand, is transported on the great international railways across the borders north and south throughout the nights, Sundays and holidays of the year, and to inhibit it would be to strangle the passenger traffic across international lines.

This interpretation of the law is a reasonable one, justified by the situation at the time of the amendment and the natural solution of the governmental problem; and is the only construction which will not do violence to the language of the act, and will preserve the constitutional guaranties. It should, therefore, be adopted.

*Equity—Status of Bridge Owner.*
*Bridge Owner's Interest.*

## POINT IV.

**The International Railway Company is entitled to relief in equity from the coercive measures employed by the collector.**

The last sentence of the opinion of Ward, J., in the decision of the International case by the Circuit Court of Appeals (International Record Fol. 48) is as follows: "The plaintiff has no "standing to question these regulations which do "not apply to it but to the owners of private con- "veyances and of personal baggage brought over "the bridge." It is undisputed that the regulations have been promulgated and the threats of the Collector have been made to require the International Railway Company and another bridge owner to give a bond for $50,000 and to take out a special license for the unlading of cargo at night. It is stipulated the Collector has said in affidavit that "if the plaintiff would pay the in- "spectors for the overtime, Sunday and holiday "inspection, the defendant Davidson would in- "struct his deputy collector and inspectors to ex- "amine and admit the baggage of foot passen- "gers and automobiles and their contents, but "that this additional service would be gratuitous "and in the nature of a concession and the de- "fendant Davidson would put in effect the ruling "of the Department on Sunday, December 6, "1920, for Sundays and holidays thereafter and "that defendant Davidson has it in his power to

"compel the complainant to pay time and a half "to the inspectors working at the request of the "complainant from 5:00 P. M. to 8:00 A. M., and "has the power to exclude baggage and vehicles "until 8:00 o'clock A. M. the following day, or to "require the deposit of the same unless complain- "ant pays the sum required by law;" It is also undisputed in the International Railway case that "if defendant Davidson was permitted unlaw- "fully to close said bridges, the patronage of "complainant's said street car lines operating up- "on the bridges would be greatly decreased be- "cause of uncertainty attendant upon transporta- "tion; and * * that complainant would lose profits "and income by way of toll upon the bridges and "fares upon the cars, and the said loss would be "immeasurable and not computable."

We are therefore confronted with this situation: The defendant Davidson unlawfully required the appellant Internationl Railway Company to pay fees which it is not required by law to pay. Because of its refusal to pay these fees unlawfully demanded, the Collector first threatened to close the bridges on Sundays and holidays (International Record, Fol. 16), and later contended to threaten to forbid any vehicles to enter the United States over those bridges. These regulations of the traffic upon the bridges were unlawful. The Collector further threatened to place a guard upon the bridges and turn back to the United States those passengers who would not permit him to impound their baggage and vehicles. The

acts threatened and the regulations promulgated were illegal. They destroyed the traffic upon the bridges of the International Railway Company and thereby, it is undisputed, confidence in the continuity of traffic across the bridges, which was an element in their successful operation, would be stopped and complainant would lose immediately and irreparably a large amount of traffic incomputable and not compensable in damages (International Record, Fol. 19). The Circuit Court of Appeals has held that although this unlawful action was taken with the avowed purpose of unlawfully compelling the bridge owner to pay fees for which it was not lawfully liable and would result in incomputable damage to the bridge owner, nevertheless the bridge owner had no standing in court to object to it in equity or to have it enjoined because the regulations do not apply to the bridges but to the owner of private conveyances and personal baggage brought over the bridge. This case is quite within the principle of the decision of the Lord Chancellor of England decided in the case of

*Emperor of Austria against Day and one*
*3 DeGex F. & J., 217.*

One Kussuth, an exile from Austria, had caused to be printed paper money, which did not resemble the money of Hungary but purported to be a new issue of Hungarian money signed by Kussuth on behalf of that State. The Emperor of Austria as King of Hungary sought relief in Chancery to have the plates and

the money destroyed and to have Kussuth and the printers restrained from proceeding in the venture. The case revealed that the Bank of Austria which had the issuance of money in Hungary and the Hungarian people were the persons against whom Kussuth's act was contemplated, to diminish the value of the bank currency and to cause the holders of that currency to lose because it would diminish in value upon the circulation of the new issue which did not purport to be that of the Austrian Bank but of the State of Hungary. In these circumstances the Emperor of Austria because he had the right to issue the Austrian Bank currency and had a profit thereby was deemed to have a property right which was affected by the action of Kussuth, and an injunction at his suit was granted.

Similarly here, although the acts of the Collector are directed toward passengers upon the toll bridges, it is undisputed from the bill and the affidavits that this will greatly affect the bridge owner's income by diminishing tolls and by destroying confidence in the continuity of traffic upon its bridges. It is undisputed that a large financial loss will ensue, and under the principle of the English case cited, the wrong to the bridge company should not be without a remedy, and although the acts are directed against its clients rather than against itself, it should be protected from this violation of its business by an injunction.

*Interference With Contracts.*

The statement in the opinion of the Circuit Court of Appeals, was made without the citation of authority to support it. The point was not raised by the Collector upon his brief and the statement was probably without a consideration of the authorities and overlooked one of the important interventions of the "strong arm of "equity" to prevent irreparable wrong.

The Collector's regulations were made for the purpose of compelling the bridge owner to give a substantial bond and obtain a license to which by law he was not compelled. This appears from the terms upon which the regulations were issued. It is also apparent from the affidavits of the Collector that if such a bond and license for cargo were taken out by the bridge owner, although the bridge owner had nothing to do with cargo or merchandise on Sundays and holidays or at night time, the Collector would call off his guard who was to stop vehicular traffic at the American end of the bridges and cause the baggage and vehicles of miscellaneous passengers to be inspected forthwith. Thus the unlawful requirements by the Collector against the bridge owner was to be enforced by unlawful, unauthorized regulations against its customers, the passengers upon its bridges.

A passenger who had paid the toll for the use of the bridge would be met by the Collector's guard before his use of the bridge was completed and turned back. He would thus be denied, by the operation of law, the completion of a contract made with the bridge owner. The contract would

be nullified by these unlawful acts of the Collector through his guard and thus it is seen that the regulations and actions of that officer constituted an interference not only unlawfully but vexatiously and for the purpose of coercion between parties to contracts already made. It is clear that this situation is similar to that in which the railroad companies found themselves when special limited return excursion tickets were purchased by ticket brokers who thus induced the ticket holder to break his contract for return passage with the railroad company. This case is stronger than that because there the ticket brokers' actions were not violative of any statute but were unlawful only as they constituted an interference between parties to contracts made, and this court there affirmed an intervention by an injunction to prevent that wrong.

*Bitterman v. Louisville & N. R. Co.*, 207 U. S. 205, 52 L. Ed. 171.

Mr. Justice White in that case also cited

*Angle v. Chicago St. P. M. & O. R. Co.*, 151 U. S. 1, 38 L. Ed. 55.

It is undisputed here that the unlawful action against which equity should intervene will cause a great decrease of street car patronage, a loss of profits and income immeasurable and not compensable in damages.

It is fundamental that anyone threatened with an invasion of his property rights by the illegal act of another is entitled to relief in equity to pre-

vent such invasion, if his remedy at law is inadequate. This is particularly true as to such rights as "good-will" attached to property used in one's business. The whole series of cases involving illegal boycotts and granting an injunction to the employer against unlawful interference with his relations with prospective customers as well as with his employees proceeds upon the basis that an interference with plaintiff's business such as is here threatened is within the cognizance of a court of equity, and, if illegal, will be enjoined at the suit of the property or business owner.

*Auburn Draying Co. v. Wardell*, 227 N. Y. 1.

*Iron Molders' Union v. Allis Chambers Co.*, 166 Fed. 45.

See also *Goldfield Consolidated Mines Co. vs. Richardson*, 194 Fed. 198, in which the owners of mines were permitted to secure an injunction against the maintenance of a spurious assay office, on the ground that the maintenance of that office made it possible for thieves to dispose of stolen minerals and thus avoid detection.

This is a case peculiarly within the rule expressed in *Pomeroy on Equity Jurisprudence*, section 1355, as follows:

> "Another intangible kind of property which will be protected from invasion by injunction is 'good-will.' The peculiar right, or rather expectancy called 'good-will' assumes that a certain business has been established and carried on at some specific place. It consists in the probability, based upon the

> habits of men, that the persons who have been accustomed to deal with the business, at the specific place, as well as others, will continue to come to such place and deal in the future."

It will be remembered that the traffic on complainant's bridges has continued uninterrupted since 1900, and that the main element in the success of the business of maintaining public toll bridges is continued public confidence in the continuity of traffic thereon is not only evident, but is alleged in an affidavit accompanying the bill of complaint and is not contradicted, and so remains an established fact for the purposes of this case.

The point does not arise in the Snyder case, brought by a passenger forced to surrender into pound his vehicle and baggage by these unlawful regulations.

## POINT V.

### The decisions below were based upon incorrect assumptions of fact, and were incorrect in law.

Opinions were written in the International Railway Company case by both lower courts (International Record, Fols. 35-38, incl., 44-48 incl.). Both opinions indicate that these courts misapprehended the facts, and overlooked some of the authorities cited upon this brief.

The opinion of the Circuit Court of Appeals, per Ward, J., assumed that the amended statute

does not apply to the bridge owner, and based its decision upon the power of the Collector to make regulations under Section 161 Revised Statutes. It is stated that the Government has no obligation to maintain inspectors at any point on the frontier, and with this the appellants are in accord. There has been no attempt to compel inspection. We have indicated that in the absence of inspectors at the border, a statutory duty, under heavy penalty is laid upon any importer of dutiable merchandise. That the regulations of the collector are contrary to the statutes we have already shown, and submit that no authority can be found to enable the Collector by regulation to pass another statute similar to the Act of February 7, 1920, but embracing baggage which the Congress omitted from that statute, as indicated at folio 48 of the opinion.

It is stated by the Circuit Court of Appeals that the Secretary of the Treasury does not compel the bridge company to pay the inspectors' salaries. To so hold is to ignore the written and verbal threats to close the bridges from Saturday night until the following Monday morning (International Record, Fols. 17, 19) and to overlook the affidavit of the Collector that he would place a guard at the American end of the bridges to turn back into Canada all passengers who would not surrender their belongings to him, to be kept in pound for a period of days at the risk of the passenger (International Record, Fol. 26). This was nothing less than compulsion, and it is admitted was for the sole purpose of compelling the bridge-

owner to pay salaries of inspection officers (International Record, Fols. 16, 21, 25, 27). These stipulations of fact must be regarded as binding upon the Circuit Court of Appeals.

The Circuit Court of Appeals in reviewing the International case bases its decision of the judgment dismissing the bill upon the ground that regulations might be issued under Section 161 of the United States Revised Statute, and that the regulations of the Collector issued under that section had the force of law, and that the rules which the collector issued were such regulations. This, of course, failed to consider the written threat of November 27th, and the verbal threat of December 3rd, (International Record, Fols. 16, 19), and confined the Collector's threats to his rules published on December 3rd. We merely wish to refer here to the obvious fact that although the rules promulgated by the Collector were not so broad as his written threats, the appellant, International Railway Company, has no assurance aside from an injunction, that those written threats will not in their full scope be carried out, and no conveyance be permitted to cross the bridges under any condition.

We have indicated the respects in which the Collector by his regulation endeavored to enlarge the statutory burdens for revenue upon commerce on the northern frontier. We are familiar with the cases which have held that regulations for the purpose of administering the law are competent under Section 161 under the revised statutes, and

have the force of law, but these regulations attempted to add to the law and to the burdens which the law laid upon this commerce. They were, therefore legislation and not regulation under the statute; adding as they did a provision for impounding all baggage for thirty-two to fifty-six hours to the statutory provision, which gave the right of detention of baggage only under limited conditions, and as a penalty adding to the provision which allowed the importation of vessels and carriages of every description over this frontier, a provision that such importation could not be made on Sundays and holidays; and adding to the provision that cargo carriers must obtain special licenses for inspection on Sunday; a provision that baggage carriers must obtain such a license; or stronger yet, that bridge owners which were neither baggage carriers nor cargo carriers, but a mere conduit of traffic should procure for the benefit of vehicular operators, pedestrians and trolley passengers, a special license and give a $50,000.00 bond, conditioned that no harm shall come to the United States from such traffic. These were legislation. These constituted the imposition of heavy burdens not contemplated by the statute. These were far beyond regulation and far beyond the power of the Collector.

We believe that the standing of the appellant International Railway Company in a court of equity to enjoin the unlawful threats and regulations of the Collector has been established under Point IV of this brief.

*District Court Opinion.*
*Disagreement of Lower Courts.*

The District Judge in his opinion similarly overlooked the statutory and constitutional limitations upon the regulations of the Collector, and the several threats of the Collector to close the bridges. The trolley cars upon the bridges which are not the subject of the regulations, but are expressly excepted were made the basis for extending the terms of the statute to the bridge-owner, although it did not unlade cargo. The inapplicability of the statute to the conditions on the bridges was dismissed, and it was held that because the passenger must unload his baggage for inspection, this justified the requirement of a special license prescribed for the unlading of cargo (although baggage is not cargo) whenever the inspection took place at night. The construction seems a violent one, and entirely unnecessary in view of the circumstances surrounding the enactment of the amendment and the problems it was meant to solve as outlined under Point III; and we believe that the construction there contended for is the correct one. The Circuit Court of Appeals, it will be observed, did not adopt the reasoning of the Trial Judge, in rendering their decision of affirmance.

The lower courts have not proven unanimous in the application of this statute. Here the District Judge applied it, with its burdens to passengers' baggage and required the bridge-owner to take out a special cargo license under a special cargo bond (International Record, Fol. ). The Circuit Court of Appeals did not pass up-

on the question but held that the power to make regulations under Section 161 Revised Statutes justified the threatened action. But when a similar question came before the Supreme Court of the District of Columbia in the case of *Minneapolis, St. Paul and Sault Ste Marie Ry. Co. vs. Andrew W. Mellon* as Secretary of the Treasury, (in Equity No. 39,025) for an injunction, that Court made an order contrary to the order of the District Court here, and decreed:

> 'That the Act of Congress approved February 13, 1911, entitled "An Act to Provide for the lading or unlading of vessels at night, the preliminary entry of vessels, and for other purposes', as amended by the Act of Congress approved February 7, 1920, does not apply to the examination of the baggage of passengers transported from Canada on trains running over the lines of railroad of plaintiff and entering the United States at the points of Portal, Noyes and Sault Sainte Marie between the hours of five p. m. and eight a. m., and on Sundays and holidays, and the said defendant, Andrew W. Mellon, as Secretary of the Treasury of the United States, forthwith be, and he hereby is, perpetually enjoined from holding to the contrary and from directing, authorizing or permitting the Collectors of Customs of the United States at said points of Portal, Noyes and Sault Sainte Marie, or any other officer, agent or employe of the United States to collect from the plaintiff extra compensation or any compensation whatever for inspectors of customs or other customs employes for services in connection with the unlading, receiving or examination of passengers' baggage entering the United States at said points up-

on plaintiff's trains between the hours aforesaid, and on Sundays and holidays.

"PROVIDED, That the complainant execute and file in this cause as undertaking in conformity with Rule 41 of this Court."

## POINT VI.

### The Supreme Court has jurisdiction of these appeals.

The International Railway Case, by appeal from the Circuit Court of Appeals, is properly here, the decision of the Circuit Court of Appeals not being final in such a case.

In *Spreckles Sugar Refining Co. v. McClain*, 192 U. S., 397, 48, L. Ed., 496, a suit was brought to recover the amount of a tax paid on protest under the War Revenue Act of 1898. The validity of the tax was assailed upon the ground that it violated the rights of the plaintiff under the Federal constitution. The court held that an appeal properly lay from the judgment of the Circuit Court of Appeals, the court holding that while the tax was one which was paid under a Revenue Law, the suit, nevertheless was not such a cause as was intended to be included within Section 128 of the Judicial Code (Rev. Sec. 120), making the judgments and decrees of the Circuit Court of Appeals final in all cases arising under the Revenue Laws. The court there said (page 408):

"The meaning of the words 'arising • • •

> under the revenue laws,' in the 6th section, is satisfied if they are held as embracing a case strictly arising under laws providing for internal revenues and which does not by reason of any question in it, belong also to the class mentioned in the 5th section of that act. We do not think that the words quoted necessarily embrace a case carried to the circuit court of appeals, which, although arising under the revenue laws, and involving a construction of those laws, depends, for a full determination of the rights of the parties, upon the construction or application of the Constitution, or upon the constitutionality of an act of Congress. We lean to that interpretation of the act which the defeated party in such a case in the circuit court of appeals to have, as of right, upon writ of error to that court, a re-examination here of the judgment (the requisite amount being involved) if the correctness of the judgment depends in whole or in part upon the application or construction of the Constitution, or upon the constitutionality of any act of Congress drawn in question."

The court further held it was not incumbent upon the appellant to go directly to the Supreme Court from the district court, but that in such case he could at his election go first to the Circuit Court of Appeals and then to the Supreme Court.

*American Sugar Refining Co. v. New Orleans*, 181 U. S. 277, 280.

*Loeb v. Columbia*, 179 U. S. 472.

*Altman & Co. v. United States*, 224 U. S., 583.

The amount involved is more than one thousand dollars (International Record, Fol. 53).

The appeal in the case of Thomas Snyder is properly taken direct from the District Court decree to the Supreme Court.

The question whether the Constitution allows regulations of the Treasury Department adopted by merely executive officers to be regarded as having the force of law is one that involves the construction or application of the Constitution within the act of March 3, 1891, and permits an appeal direct to this Court from the District Court.

*Boske vs. Comingore*, 177 U. S., 459; 44 L. Ed., 846.

For the reasons assigned it is respectfully submitted that the decisions of the District Court and the Circuit Court of Appeals should be reversed, and an injunction directed as prayed for in the bills of complaint.

BASIL ROBILLARD,
*Of Counsel for Appellants.*

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# In the Supreme Court of the United States.

OCTOBER TERM, 1921.

INTERNATIONAL RAILWAY COMPANY, appellant,
*v.*
GEORGE G. DAVIDSON, INDIVIDUALLY AND as Collector of the Port of Buffalo, et al., appellee.
No. 340.

THOMAS SNYDER, ON BEHALF OF HIMSELF and All Others Similarly Situated, appellant,
*v.*
GEORGE G. DAVIDSON, INDIVIDUALLY AND as Collector of the Port of Buffalo, et al., appellee.
No. 368.

## BRIEF FOR APPELLEE.

### STATUS.

The above-entitled causes were brought in the United States District Court for the Western District of New York to restrain George G. Davidson, jr., collector of customs for the ninth customs district, Buffalo, New York, from enforcing against the appellant, International Railway Company, and against the appellant, Thomas Snyder and all others

similarly situated, the provisions of section 5, act of Congress approved February 13, 1911, ch. 46, as amended by act of Congress approved February 7, 1920, ch. 61, which provides for extra compensation to customs inspectors and other customs officials who may be required to work overtime or remain on duty on Sundays or holidays, and that said extra compensation "shall be paid by the master, owner, agent, or consignee of such vessel or other conveyance."

In each of the above causes the District Court denied the relief prayed for and dismissed the bill.

In the *International Railway Company case*, appeal was prosecuted to the Circuit Court of Appeals for the Second Circuit, where the decree of the District Court was affirmed, and the case is now brought here on appeal from the decree of the Circuit Court of Appeals.

In the case of *Thomas Snyder* v. *Davidson et al.*, appeal is prosecuted to this court from the decree of the District Court dismissing the bill of complaint.

The above cases have been consolidated for argument, and hereafter they will be treated as one. Wherever reference is made to the record, it will refer to the record in the appeal of the International Railway Company.

**STATEMENT.**

The International Railway Company, a corporation organized under the laws of the State of New York, owns and operates two public toll bridges across the Niagara River and across the boundary between the United States and Canada, one, known as the Upper Steel Arch Bridge, between Niagara Falls, New York,

and Niagara Falls, Canada, and the other, known as the Lewiston-Queenston Bridge, connecting Lewiston, New York, and Queenston, Canada. The International Railway Company also operates a line of trolley cars over and across said bridges. It will hereafter be designated as the appellant.

George G. Davidson, jr., is the collector of customs for the port of Buffalo, New York, officially known as the ninth customs district. Whatever he did or proposed to do was done or proposed in his official capacity, at and in consequence of official directions given him by the Secretary of the Treasury. He will hereinafter be designated the collector.

On or about June 29, 1920, the collector wrote to appellant, referring to the act of February 7, 1920, ch. 61, amending section 5 of the act of February 13, 1911, ch. 46, relating to extra compensation for overtime services and services on Sundays and holidays performed by customs officers in connection with the lading, unlading, and inspection of cargo and baggage in accordance with said act, and advised appellant that, beginning July 1, 1920, "you will be required to pay two days' pay for each Sunday or holiday for every customs officer performing service in connection with your company." (R. 7–8.)

The collector made the demand on appellant in accordance with directions from the Secretary of the Treasury, who had fixed the rate of extra compensation under authority of the act of February 7, 1920, ch. 61.

Appellant refused to pay the amounts demanded by the collector. (R. 8.) Thereupon the collector advised appellant that he had received the following instructions from the Secretary of the Treasury:

> If the bridge companies refuse to pay for the service, no conveyance should be permitted to enter the United States until 8 a. m., when the regular working day following a Sunday or holiday begins. (R. 9.)

The collector also advised appellant that conveyances would not be allowed to cross said bridges on Sundays and holidays unless application made for special license should be granted, bond filed, and the other provisions of the act of February 13, 1911, as amended, complied with. (R. 8–9.)

Subsequently, regulations were promulgated by the collector to the effect that passengers should be allowed to pass over the bridges and enter the United States, but that in the absence of a license therefor no baggage would be inspected on Sundays and holidays, and that such baggage and vehicles would have to be delivered over to the custody of the collector to be examined and inspected on the day succeeding such Sunday or holiday. (R. 11.)

The facts presented by the record in this case raise the following points of law for the determination of this court:

**QUESTIONS INVOLVED.**

1. Does the appeal of Thomas Snyder et al. present a constitutional question for the determination of this court?

2. Were the regulations promulgated by the Secretary of the Treasury in regard to the inspection of baggage and vehicles authorized by law?

3. Was the action of the collector of customs in refusing inspection service on Sundays and holidays, unless application therefor was first made and the cost of such service reimbursed, justified in law?

ARGUMENT.

I.

**Does the appeal of Thomas Snyder et al. present a constitutional question for the determination of this court?**

Appeals from District Courts direct to the Supreme Court of the United States are authorized and permitted by section 238, Judicial Code. That section, as far as it is material to our inquiry, provides:

> Appeals and writs of error may be taken from the District Courts * * * direct to the Supreme Court in the following cases:
>
> * * * * *
>
> in any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question * * *.

Appellant's appeal does not raise for the construction of this court any section or paragraph of the Constitution. The appeal attempts to raise the constitutionality of a law of the United States, but that is not the main question presented here, and

that the attempt to raise the constitutional question is made for jurisdictional purposes only is so apparent as to render the contention frivolous.

Questions raised for purposes of direct appeal to the Supreme Court must be real and substantial, and not be put forward merely to justify a direct appeal. (*Penn. Mut. L. Ins. Co.* v. *Austin*, 168 U. S. 685; *Goodrich* v. *Ferris*, 214 U. S. 71, 79, 81; *Kaufman & Sons Co.* v. *Smith*, 216 U. S. 610; *Farrell* v. *O'Brien*, 199 U. S. 100.)

A case involving only the construction and not the constitutionality of a Federal statute can not be brought directly to the Supreme Court. (*Sugar Refining Co.* v. *McClain*, 192 U. S. 397; *Rakes* v. *United States*, 212 U. S. 55.)

The contention by importers that Treasury regulations respecting tests for sugar assumed to add something to the dutiable standard prescribed by a tariff act, and that the Secretary of the Treasury thus exercised legislative power, confided by the Constitution solely to Congress, is not a real and substantial controversy. (*Am. Sugar Ref. Co.* v. *United States*, 211 U. S. 155.)

A claim that merchandise coming from the Canal Zone could not be subjected to the duties imposed on merchandise imported from foreign countries is a frivolous one, and will not justify a direct appeal to this court. (*Kaufman & Sons Co.* v. *Smith*, 216 U. S. 610.)

The constitutional question presented must be the controlling question involved in the case. (*Carey* v.

*Ry. Co.*, 150 U. S. 170; *Sugar Refining Co.* v. *McClain*, 192 U. S. 397.)

When independent questions of general law are raised, the Circuit Courts of Appeals have jurisdiction to hear and decide all questions. (*United States* v. *Jahn*, 155 U. S. 109.)

While an attempt has been made to bring into question the constitutionality of a Federal statute or a regulation made in pursuance thereof, it is evident that this has been done to aid the appeal, and that no such question is fairly presented. A direct appeal will not lie when the only real question involved is whether the bill presents a case for equitable relief. (*Scully* v. *Bird*, 209 U. S. 481.)

The effect and force of the Treasury regulation, if made in pursuance of law, has been decided by this court (*Boske* v. *Comingore*, 177 U. S. 459), and can not again be raised for the purpose of supporting this appeal.

## II.

**Were the regulations promulgated by the Secretary of the Treasury in regard to the inspection of baggage and vehicles authorized by law?**

All matters pertaining to the collection of the customs revenue are under the jurisdiction of the Secretary of the Treasury. The Secretary of the Treasury has authority to make and promulgate rules and regulations, not inconsistent with law, for the distribution and performance of the business of his department.

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Section 161, R. S. (235 Comp. St.), provides that:

> The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining thereto.

Such regulations, when not in contravention of a statute, have the force and effect of law. (*Caha* v. *United States*, 152 U. S. 221; *Ex parte Reed*, 100 U. S. 13.)

A regulation adopted under this statute will not be disregarded or annulled by the courts. (*Boske* v. *Comingore*, 177 U. S. 459.)

While the Secretary of the Treasury can not make regulations to alter or amend a revenue law, he can make regulations to carry into effect what Congress has enacted. (*Morrill* v. *Jones*, 106 U. S. 466.)

Section 249, Revised Statutes (382 Comp. St.), requires the Secretary of the Treasury to direct the superintendence of the collection of duties on imports.

Section 2651, Revised Statutes (5391 Comp. St.), provides:

> The Secretary of the Treasury may, from time to time, make such regulations not inconsistent with law, for the government of the special agents, as he deems expedient * * *.

Section 2652, Revised Statutes (5392 Comp. St.), provides that:

> It shall be the duty of all officers of the customs to execute and carry into effect all instructions of the Secretary of the Treasury relative to the execution of the revenue laws; and in case any difficulty shall arise as to the true construction or meaning of any part of the revenue laws, the decisions of the Secretary of the Treasury shall be conclusive and binding upon all officers of the customs.

The collector, at the direction of the Secretary of the Treasury, issued the following regulations pertaining to the examination and inspection of baggage and vehicles crossing appellant's bridges from Canada to the United States on Sundays and holidays (R. 11–12):

> 1. Trolleys may come in after full examination.
>
> 2. Trolley passengers may come in after surrendering all baggage and effects, to be examined after 8 a. m. on the day succeeding each Sunday or holiday.
>
> 3. Foot passengers may come in after surrendering all baggage and effects, to be examined after 8 a. m. on the day succeeding each Sunday or holiday.
>
> 4. All vehicular passengers except trolley passengers may come in after surrendering all baggage and effects, to be examined after 8 a. m. on the day succeeding such Sunday or holiday. All such vehicles will not be allowed to enter the United States until after their

examination on the day succeeding each Sunday or holiday.

5. All outgoing traffic may proceed as usual.

6. There must be no examination of incoming passengers' baggage, freight, or merchandise, no matter how small, including autos, teams, and other vehicles except trolleys.

7. Any baggage left for examination by customs officers will be held at owner's risk.

8. You will use all reasonable means to advise all persons leaving the United States by way of bridges that there will be no examination of passengers' baggage and vehicles other than trolley cars until the day succeeding each Sunday or holiday.

9. You will understand that you are not to interfere with passenger traffic but must postpone all examinations until the day succeeding each Sunday or holiday.

10. These instructions are not confidential and may be shown to any interested party, and that such instructions were issued under orders of the United States Treasury Department, and as collector of customs.

The above regulations are reasonable and within the authority of the Secretary of the Treasury to make. They in no way attempt to divest appellant of his property rights, and are, therefore, not in contravention of any provision of the Constitution of the United States.

Where the regulation is reasonable and not contrary to law, the courts will not attempt to review the administrative discretion of the officer making it. (*Keim* v. *United States*, 177 U. S. 290.)

III.

**Was the action of the collector of customs in refusing inspection service on Sundays and holidays, unless application therefor was first made and the cost of such service reimbursed, justified in law?**

The statutes relating to the entry of passengers' baggage, so far as they are material to this case, provide as follows:

Section 2799 R. S. (Comp. St. 5496):

> In order to ascertain what articles ought to be exempted as the wearing apparel, and other personal baggage * * * of persons who arrive in the United States, due entry thereof, as of other merchandise, but separate and distinct from that of other merchandise, imported from a foreign port, shall be made with the collector of the district in which the articles are intended to be landed * * *.

Section 2801 R. S. (Comp. St. 5498):

> On compliance with the two preceding sections, and not otherwise, a permit shall be granted for landing such articles. But whenever the collector and the naval officer, if any, think proper, they may direct the baggage of any person arriving within the United States to be examined by the surveyor of the port, or by an inspector of the customs, who shall make a return of the same: * * *.

With reference to importations from Canada, the statutes provide:

Section 3096 R. S. (Comp. St. 5808):

> All persons may import any merchandise of which the importation shall not be entirely

prohibited into the districts which are or may be established on the northern and northwestern boundaries of the United States, in vessels or boats of any burden, and in rafts or carriages of any kind or nature whatsoever.

Section 3100 R. S. (Comp. St. 5812):

> All merchandise, and all baggage and effects of passengers, and all other articles imported into the United States from any contiguous foreign country, except as hereafter provided, as well as the vessels, cars, and other vehicles and envelopes in which the same shall be imported, *shall be unladen in the presence of*, and be *inspected by, an inspector or other officer of the customs*, at the first port of entry or customhouse in the United States where the same shall arrive; and to enable the proper officer thoroughly to discharge this duty, he may require the owner or his agent, or other person having charge or possession of any trunk, traveling bag or sack, valise, or other envelope, or of any closed vessel, car, or other vehicle, to open the same, or to deliver to him the proper key.

The merchandise must be submitted for inspection and examination whether dutiable or not. (*Estes* v. *United States*, 227 Fed. 818.)

It follows that baggage must be offered for examination and inspection, whether the same contains dutiable articles or not.

It is not for the importer or owner of the baggage to decide whether the articles imported or the contents of the baggage are dutiable or subject to entry

free of duty. That is the duty of the customs officials (*United States* v. *Fifty Waltham Watch Movements*, 139 Fed. 291), and it can not be performed without examination and inspection.

It must be conceded that the above-quoted statutes require *all persons* coming across the boundary line from Canada to the United States to submit to inspection of the customs officials their vehicles, baggage, and personal effects; that it is the duty of the collector to supply such inspection service during the regular working hours of such inspectors, as provided by the statutes and the regulations of the Secretary of the Treasury; and that such inspection must be made at the point of crossing the boundary to make the same effective and to prevent smuggling.

But is it mandatory on the collector to furnish this inspection service, free of charge, during all hours of the day and night, and on Sundays and holidays? The contention of appellant is that the expense of this extra service must be borne by the Government. The statutes hereinafter referred to negative that proposition.

The act of February 13, 1911, ch. 46, 36 Stat. 899 (Comp. St. 5559 et seq.), relates to the unlading of vessels and other conveyances at night. Said act, so far as the same is material to this case, provides—

Section 1 (Comp. St. 5559):

> Upon arrival at any port in the United States of any vessel or *other conveyance* from a foreign port or *place*, either directly or by way of another port in the United States, * * *

and, after due report and entry of such vessel in accordance with existing law or due report, under such *regulations as the Secretary of the Treasury may prescribe*, of the arrival of such *other conveyances*, the collector of customs, with the concurrence of the naval officer at ports where there is a naval officer, shall grant, upon proper application therefor, a special license to lade or unlade the cargo of any such vessel or other conveyance at night; that is to say, between sunset and sunrise.

Section 3 (Comp. St. 5561):

Before any such special license to lade or unlade at night shall be granted, * * * the master, owner, agent, or consignee of such vessel or *other conveyance* shall make proper application therefor and shall at the same time execute and deliver to the United States, through the collector of customs, a good and sufficient bond, in a penal sum to be approved by the said collector, conditioned to indemnify and save the United States harmless from any and all losses and liabilities which may occur or be occasioned by reason of the granting of such special license or the issuing or granting of such permit for immediate lading or unlading; * * *.

Section 4 (Comp. St. 5562):

Application having been duly made and the required bond having been duly executed and delivered, special license or licenses to lade or unlade at night after regular entry of vessels, and due *report of other conveyances* may be granted, and a permit or permits may be

issued for the immediate lading and unlading, by day and night, of vessels admitted to preliminary entry, or of other conveyances of which due report of arrival has been made; * * *.

Section 5 (Comp. St. 5571) was amended by the act of February 7, 1920, ch. 61 (41 Stat. 402), to read as follows:

That the Secretary of the Treasury shall fix a reasonable rate of *extra compensation* for *overtime services* of inspectors, storekeepers, weighers, and other customs officers and employees who *may be required* to remain on duty between the hours of five o'clock postmeridian and eight o'clock antemeridian, or *on Sundays or holidays*, to perform services in connection with the lading or unlading of cargo, or the lading of cargo or merchandise for transportation in bond or for exportation in bond, or for exportation with benefit of drawback, or in connection with the receiving or delivery of cargo on or from the wharf, or in connection with the unlading, *receiving*, or *examination* of *passengers' baggage*, such rates to be fixed on the basis of one-half day's additional pay for each two hours or fraction thereof of at least one hour that the overtime extends beyond five o'clock postmeridian (but not to exceed two and one-half days' pay for the full period from five o'clock postmeridian to eight o'clock antemeridian), and *two additional days' pay for Sunday or holiday duty.* The said *extra compensation* shall be paid by the master, *owner*, *agent*, or *consignee* of such vessel or

*other conveyance* whenever such special license or permit for immediate lading or unlading or for lading or unlading at *night* or on *Sundays or holidays* shall be granted to the collector of customs, who shall pay the same to the several customs officers and employees entitled thereto according to the rates fixed therefor by the Secretary of the Treasury: *Provided*, That such extra compensation shall be paid if such officers or employees have been ordered to report for duty and have so reported, whether the actual lading, unlading, receiving, delivery, or examination takes place or not. Customs officers acting as boarding officers and any customs officer who may be designated for that purpose by the collector of customs are hereby authorized to administer the oath or affirmation herein provided for, and such boarding officers shall be allowed extra compensation for services in boarding vessels at night or on Sundays or holidays, at the rates prescribed by the Secretary of the Treasury as herein provided, the said extra compensation to be paid by the master, owner, agent, or consignee of such vessel: *Provided further*, That in those ports where customary working hours are other than those hereinabove mentioned, the collector of customs is vested with authority to regulate the hours of customs employees, so as to agree with prevailing working hours in said ports, but nothing contained in this proviso shall be construed in any manner to affect or alter the length of a working day for customs employees or the overtime pay herein fixed.

Customs officials performing inspection services can not be compelled to work after the close of the regular working day, unless paid the extra compensation provided by the statutes and the regulations of the Secretary of the Treasury, made in pursuance thereof.

It is evident that Congress intended, by the amendment to the act of February 13, 1911, *supra*, that customs officials engaged in inspecting merchandise or baggage should be paid the extra compensation provided for all overtime work, or for services rendered on Sundays and holidays. It made no provision for the Government to bear this expense. On the other hand, the act plainly provides that this extra service, if performed at all, should only be performed at the request and expense of the parties receiving the benefit; that is to say, the persons desiring such inspection at times other than during the regular working day.

The act of February 7, 1920, *supra*, effectively fixes the working day of inspectors and other customs officials, and provides extra compensation for those "who may be required to remain on duty between the hours of five o'clock postmeridian and eight o'clock antemeridian, or on Sundays or holidays." This language fixes the regular working day to be between the hours of eight o'clock a. m. and five o'clock p. m., an eight-hour day.

If the exigencies of the public require this inspection service at other hours of the day or night and on Sundays or holidays, then the customs officials rendering such service are to be paid the extra compensation authorized by the act and fixed by the

regulation of the Secretary of the Treasury in pursuance of said act.

The act also provides that the said extra compensation "shall be paid by the master, *owner*, *agent*, or *consignee* of such vessel or *other conveyance*" whenever such special service shall be rendered, and that the same shall be paid to the collector of customs for the persons rendering such service. What can be plainer than this language? It is made applicable not alone to the master of the vessel but to the owner of the "other conveyance."

No attempt has been made to close appellants' bridges or to stop traffic across them on Sundays or holidays. The regulations of the collector heretofore quoted merely provide that no inspection service can be furnished on Sundays or holidays unless such special service is applied for, granted, and paid for by the person or persons making the application and receiving the benefit.

The customs laws, as heretofore shown, do not authorize the collector to permit baggage or merchandise to pass over the boundary line and enter the United States unless the same is first properly inspected. All baggage must be examined and passed by the customs officials before it can be allowed to enter this country. If it arrives and is submitted for inspection during the regular working day fixed by the statute, no charge is made for such inspection. If anyone desires to bring merchandise, baggage, or vehicles into the United States from a contiguous foreign territory at a time other than the

regular working day, then the special inspection service may be rendered, but only at the applicant's expense.

This whole case hinges around the proper construction of the act of February 13, 1911, as amended by the act of February 7, 1920, *supra*. The fair intendment of this statute and the only reasonable interpretation that can be given to it, is that the persons who inspect cargo and baggage at night, whether arriving from contiguous or noncontiguous countries, whether by ship or by other conveyance, are entitled to the extra compensation provided by law, the same to be paid by the person for whom the service is rendered.

The Circuit Court of Appeals, Second Circuit, in affirming the decree of the District Court for the Western District of New York, dismissing the bill (271 Fed. 313) effectively disposes of appellant's contentions in the following appropriate language:

> Regulations as to the inspection of conveyances and personal baggage similar to those provided by the act of Feb. 7, 1920, even if not prescribed by that statute, can not be regarded as inconsistent with law.
>
> *The appellant is quite wrong in saying that the Secretary of the Treasury compels it to pay for the cost of such inspection. He simply says that unless the plaintiff does agree to pay for it such inspection will not be maintained.* We are also not at all persuaded by the argument that because nondutiable goods may be imported into the United States no inspection can be enforced in respect to them before entry.

> Government inspection is an essential prerequisite to entry. Only so can it be determined whether goods in point of fact are dutiable. (*U. S.* v. *Waltham Watch Movements*, 139 Fed. Rep. 291.) Carriages, automobiles, and other conveyances and personal baggage may be reasonably detained to await such inspection. Otherwise a holiday would be afforded for smuggling. On the other hand, the regulations recognize that it is unnecessary to detain the plaintiff's passenger trolley cars, which run regularly forward and back on fixed tracks day in and day out throughout the year. (*International Ry. Co.* v. *Davidson*, 273 Fed. 153, 155–6.)

The above quoted language of the Circuit Court of Appeals is so conclusive that, taken in connection with what has heretofore been said, any further argument would be merely cumulative.

### CONCLUSION.

It is submitted that the appeal of Thomas Snyder et al., has not been well taken; that as to the appeal of the International Railway Company, the opinion of the Circuit Court of Appeals, Second Circuit, correctly construes the statutes involved and the decree of that court should be affirmed.

JAMES M. BECK,
*Solicitor General.*
ALBERT OTTINGER,
*Assistant Attorney General.*
HARVEY B. COX,
*Attorney.*

DECEMBER, 1921.

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FILED
DEC 19 1921
WM. R. STANSBURY
CLERK

IN THE

# Supreme Court of the United States

October Term 1921

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| INTERNATIONAL RAILWAY COMPANY, *Appellant*, v. GEORGE G. DAVIDSON, individually and as Collector of the Port of Buffalo, *et al.*, *Appellee.* | *No. 340.* |
| THOMAS SNYDER, on behalf of himself and all others similarly situated, *Appellant*, v. GEORGE G. DAVIDSON, individually and as Collector of the Port of Buffalo, *et al.*, *Appellee.* | *No. 368.* |

## REPLY BRIEF FOR APPELLANTS

BASIL ROBILLARD,
*Of Counsel for Appellants.*

In The

# Supreme Court of the United States

OCTOBER TERM, 1921.

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| International Railway Company, *Appellant*, v. George G. Davidson, individually and as Collector of the Port of Buffalo, *et al.*, *Appellee.* | *No. 340.* |
| Thomas Snyder, on behalf of himself and all others similarly situated, *Appellant*, v. George G. Davidson, individually and as Collector of the Port of Buffalo, *et al.*, *Appellee.* | *No. 368.* |

## REPLY BRIEF FOR APPELLANTS.

For the convenience of the court the appellants desire to put in issue those matters in the brief of the Solicitor General which the appellants deem unsupported. Such matters concern both the facts shown in the records in the cases at bar and the law as applied to them.

## Questions Involved.

1. Does the case of Thomas Snyder involve primarily the "construction or application of the "Constitution of the United States?"

2. Did the threats of the Collector appellee involve merely a "refusal of service"?

## Argument.

### I.

### This Court has jurisdiction of the Thomas Snyder case.

The appellee states at page 5 of his brief, that constitutionality of the Law of the United States is not the main question in the Snyder case but is raised for jurisdictional purposes only. The constitutionality of the acts of a Federal officer and not of the statute is here in question. It is submitted that the decision of the Snyder case involves fundamentally these considerations:

(a) The collector, an officer of the Government, has threatened to exceed the authority of the executive department and to assume authority given to Congress by the Constitution in threatening to close these international toll bridges, to stop vehicular traffic thereupon, and to add to the burdens upon the traveler laid by the statute.

(b) The collector has threatened to take property of Dr. Snyder (his use of his personal automobile and professional kit for a period of a day

or more) from Dr. Snyder without due process of law.

(c) The collector as such officer has threatened to compel Dr. Snyder and other persons similarly situated to pay money and to give a bond for public use (the payment of Custom officers' salaries) without any compensation, as well as without warrant.

The prayer for relief in the Snyder bill of complaint (Snyder record, Fol. 6) demonstrates conclusively that these contentions are primarily involved in the case. It is submitted that they are neither "fictitious and fraudulent", "unsubstantial and frivolous", a "mere claim in words" or "unsubstantial and devoid of merit" so as to deprive this court of jurisdiction under the cases which the solicitor general cites. The appellants believe that the Constitution is as much a bulwark against bureaucratic imposition upon the citizen as against the Congressional encroachment under the case of *Home T. & T. Co. vs. Los Angeles*, 227 U. S. 278, cited upon the main brief for the appellants. It is submitted that the conduct of this officer is essentially unconstitutional; as well as contrary to the statute which gives him his official life.

Inasmuch as the construction of the statute is involved and also the construction and application of the Constitution, the appellant might either take his cause to the Circuit Court of Appeals or bring it direct to this court.

*Spreckels Sugar Ref. Co. vs. McClain*,
192 U. S. 397, 407; 48 L. Ed. 496, 499.

## II.

### The Collector threatened to infringe constitutional rights and not merely to deny custom inspection service.

The appellants are seeking to keep a guard off the international toll bridges and to restrain the collector from impounding personal property and from destroying traffic to coerce the appellants. This is apparent from the prayer for relief of the respective bills (Snyder record Fol. 6, International Record Fol. 9). They seek also to prevent the collector from closing the bridges as he threatened verbally and in writing on several occasions. (International Record, Fols. 16, 19, 26). There is nowhere in the prayer for relief any request that the collector be compelled to give custom inspection, nor is this sought indirectly. If he withdraws from the bridge heads his inspectors on Sundays and holidays, or at any other time, we are content. Upon the main brief we have pointed to the legislative provisions,—that in such event the entrant with dutiable merchandise must, under heavy penalty, seek out the collector.

The adequacy and expediency of these provisions of the Revised Statutes was a question for the Congress, and the courts below and the solicitor general in endeavoring to excuse arbitrary and unconstitutional action by the collector upon the ground that to fail to do this would afford "a holi- "day for smuggling" mistakenly presuppose that the judicial department has any concern with the adequacy of the methods prescribed by the Con-

gress for the collection of "taxes, duties and imposts".

It is said that the provision that all merchandise and articles "shall be unladen in the presence "of and be inspected by an inspector or other of- "ficer of the customs at the first port of entry or "Custom House in the United States where the "same shall arrive" (Revised Sta. Sec. 3100, Comp. Sta. 5812), compels an inspection at these bridge heads on the International boundary. This section must be read in connection with Section 3101 R. S. (Comp. Stat. §5813) both being originally the Act of June 27, 1864, Ch. 164; 13 Stat. L. 319. It thereby becomes apparent that the compulsion, if any is upon the collector, and does not justify the exaction of the illegal perquisites sought, but even forbids the very means sought to compel them.

It is submitted that the deliberate acts of the collector which threaten to close these bridges, which threaten to take the property of the appellant Snyder into pound for a period, and which threaten to interfere with the international traffic contrary to the powers of Congress as interpreted in the light of the Jay Treaty of 1794, Article III, and to illegally extort property of both appellants for the benefit of Federal employees cannot be excused upon any ground, but is an unconstitutional attempt to oppress the appellants by an assumption of the powers by the Treasury Department.

BASIL ROBILLARD,
*Of Counsel for Appellants.*

JAN 3 1922
WM. R. STANSBURY
CLERK

# Supreme Court of the United States

October Term 1921

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| INTERNATIONAL RAILWAY COMPANY, Appellant, (Complainant below) against GEORGE G. DAVIDSON, JR., individually and as Collector of the Port of Buffalo, et al., Respondent. | In Equity No. 340 |
| THOMAS SNYDER, on behalf of himself and all others similarly situated, Appellant, against GEORGE G. DAVIDSON, JR., individually and as Collector of the Port of Buffalo, et al., Respondent. | In Equity No. 368. |

## BRIEF OF JOHN W. BEAUMONT FILED, BY LEAVE OF COURT, ON BEHALF OF COMPLAINANTS IN A SIMILAR CASE AND OWNERS OF ONE OF THE BRIDGES USED BY DR. SNYDER, APPELLANT IN NO. 368.

JOHN W. BEAUMONT,
*Of Counsel for Niagara Falls International Bridge Company and Niagara Falls Suspension Bridge Company,*
1122-1129 Ford Building,
Detroit, Michigan.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

# Supreme Court of the United States

October Term 1921.

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| INTERNATIONAL RAILWAY COMPANY, *Appellant,* (*Complainant below*) against GEORGE G. DAVIDSON, JR., individually and as Collector of the Port of Buffalo, *et al.*, *Respondent.* | *In Equity No. 340.* |
| THOMAS SNYDER, on behalf of himself and all others similarly situated, *Appellant,* against GEORGE G. DAVIDSON, JR., individually and as Collector of the Port of Buffalo, *et al.*, *Respondent.* | *In Equity No. 368.* |

## BRIEF OF JOHN W. BEAUMONT AS AMICUS CURIAE:

**Filed, under leave of the court in behalf of Niagara Falls International Bridge Company and Niagara Falls Suspension Bridge Company, Complainants, in a similar case and owners of one of the bridges used by Dr. Snyder, Appellant, in No. 368.**

## Statement.

The Niagara Falls International Bridge Company and Niagara Falls Suspension Bridge Company are Complainants in a suit brought by them against the same defendant.

Their suit is pending in the District Court for the Western District of New York awaiting the outcome of the above appeals.

Their motion for a temporary injunction was denied by the District Court at the same time that the decree dismissing the bill in the International Railway Company case was made. The opinion of the District Court is reported in 271 Federal Reporter 316. The appeal from the order denying their motion for temporary injunction was argued and decided by the Circuit Court of Appeals for the Second Circuit at the same time as the International Railway Company appeal. See 273 Fed. Reporter pp. 153-6.

**The decisions of the District Court and the Circuit Court of Appeals concededly place the Niagara Falls International Bridge Company and Niagara Falls Suspension Bridge Company and persons, such as Dr. Snyder, using the bridge, at the mercy of the collector, as it is certain they cannot obtain a license.**

These companies are the owners of a steel arch bridge constructed across the Niagara River. Their bridge is referred to in the Snyder record as the Lower Arch Bridge (fol. 2). It is one of the bridges used by Dr. Snyder.

Neither of these companies is a railroad corporation and they do not own, maintain or operate any railroad or trolley road.

It is undisputed that neither these bridge companies nor a pedestrian or automobilist are entitled to obtain a license under the Act of Feb. 13, 1911 as amended by Act of Feb. 7, 1920 (Compiled Statutes Sects. 5559-5571).

In the opinion of the District Court in the Bridge Companies case Judge Hazel says:

> "True, as contended, there is no provision for licensing the plaintiff and thus compelling the Collector to have baggage, pedestrians and merchandise examined on Sundays and holidays * * * " 271 Fed. 317.

And counsel for the Collector in his brief before the Circuit Court of appeals said (at page 19):

> "The appellant Niagara Falls International Bridge Company is not a carrier who is allowed to make application for a special license for night, Sunday and holiday service, but such service would be rendered as a favor if the appellant will pay the men for their time according to regulations laid down by the Secretary of the Treasury."

Section 5 of the Act of Feb. 13, 1911, Ch. 46 as amended by Act of Feb. 7, 1920, provides:

> "The said extra compensation shall *be paid* by the master, owner, agent or consignee of such vessel or other conveyance, *whenever such special license* or permit for immediate * * * * unlading at night or on Sundays or holidays *shall be granted.*"

Neither these Bridge Companies *nor any person using its bridge (e. g.* Dr. Snyder) could obtain a special license. (Act of Feb. 13, 1911 Ch. 46-Sec. 1—sec. 5559 Compiled Stats.).

And in the affidavit of the Collector, read in opposition to the Bridge Companies, motion for an injunction pending trial, he said:

> "That under this ruling *Automobiles and foot passengers* do not come within the excepted class, that is *they cannot apply for special permits* for overtime service to be rendered to them because automobiles are themselves merchandise and may turn out to be dutiable, and foot passengers are not conveyances within the meaning of the statute." (fol. 90 of record in Circuit Court of Appeals).

It therefore appears that the position of the Collector sustained by the Circuit Court of Appeals in the International Railway Company suit and by the District Court in the Dr. Snyder suit is that neither the owners of the Lower Steel Arch Bridge nor any members of the public using it can have the bridge kept open for ordinary traf-

fic except as a matter of favor from the Collector and that the Collector as a condition of extending this favor can exact what terms he desires even though no statute applicable to this bridge is in existence.

If this position be well founded he could as well compel the bridge companies or their patrons to pay the compensation of the Government Inspection service for the entire week as a condition of permitting the bridge to be used on Sundays, nights, and holidays or even week days.

Sections 5812 and 5813 of the Compiled Statutes contain the provisions as to the right and obligations of travelers from contiguous countries and the only right given the collector to retain baggage of such travelers is in case of refusal or neglect to open the same or deliver the key and permit inspection. In this connection the phrase "*allowed by the preceding section*" in the first sentence of section 5813 should be carefully noted.

Neither the Secretary of the Treasury nor the Collector can amend or extend a statute. No more can Congress delegate to an administrative officer power to amend or extend a statute by regulation.

Upon this question, in addition to the four cases cited in Appellant's brief on pages 19 and 20, we

respectfully call attention to the following authorities.

U. S. vs. Eaton, 144 U. S. 687.
U. S. vs. United Verd Copper Co., 196 U. S. 214-5.
Williamson vs. U. S., 207 U. S. 462.
Bong vs. Campbell Art Company, 214 U. S. 248.
U. S. vs. Gimaud, 220 U. S. 517.
U. S. vs. George, 228 U. S. 19-22.
U. S. vs. Standard Brewery, 251 U. S. 219-20.

But the courts below have sanctioned the threat of the collector to substitute for his right of such immediate inspection a guard to refuse inspection and prevent ingress into the United States of all travelers who come in any vehicle or who bring anything in their hands.

The Circuit Court of Appeals in the International Railway Company suit based its decision not on the ground that the Statute was applicable to that Company but on the ground that assuming the statute was inapplicable to it nevertheless the Collector could make the statute applicable under Sec. 161 of the Revised Statutes. On the basis of such power in the collector, it decided against these bridge companies for the reasons stated in its opinion in the International Railway Company case.

Therefore, the question is clearly presented on the present appeals and especially in the Snyder appeal whether the Collector can close an ordinary bridge which is a highway and post road because some one, who is not so required by law to do, will not pay the salaries of government inspectors. Also whether the Collector can do so because of his so called "Inherent power."

If he inherently possessed such power the statutory allowance of immediate inspection in Compiled Stats. Sec. 5812 would have been unnecessary. (see first sentence of Sec. 5813).

If the Collector possesses such power he can in like manner coerce a hotel keeper located on a public highway near the border and receiving patronage from Canadian pedestrians or motorists to pay for a like service of inspectors at the boundary on said highway.

If he can stop Dr. Snyder from using the Lower Steel Arch Bridge in the practice of his profession on Sundays and Holidays, he can exert the same arbitrary interference with travel at any place on a border thousands of miles long wherein many places one can step from one country into another with greater ease than in crossing a street.

It should also be borne in mind that the complaint against the Collector is not because he in-

sists on keeping dutiable merchandise for custom assessments on business days but because he refuses to exercise his right to *immediate* inspection of nondutiable baggage and seeks to extend or change the statutory right to immediate inspection into a nonstatutory right to imponud baggage and turn back even American automobiles.

It is respectfuly submitted that the Statute governs and not the arbitrary will of the Collector or the Treasury Department.

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BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

# INTERNATIONAL RAILWAY COMPANY *v.* DAVIDSON, INDIVIDUALLY AND AS COLLECTOR OF THE PORT OF BUFFALO, ET AL.

APPEAL FROM AND CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 340. Argued January 3, 4, 1922.—Decided January 30, 1922.

1. The Act of February 13, 1911, c. 46, 36 Stat. 899, authorizing special permits for immediate lading and unlading of vessels and other conveyances, and empowering the Secretary of the Treasury to fix extra compensation to be paid customs officials at the expense of the licensees for Sunday and holiday service in such lading or unlading, was not applicable to an international toll bridge nor to the operation thereon of a line of passenger trolley cars; nor was it made so by the amendment of February 7, 1920, c. 61, 41

Stat. 402, by which the extra compensation was extended to cover overtime "in connection with the unlading, receiving, or examination of passengers' baggage," this provision being given full effect if confined to baggage of passengers on vessels for the immediate lading or unlading of whose cargoes special license may issue under the original act. P. 512.

2. A company owning and operating a toll bridge, with a line of trolley cars, across the Niagara River, over which was heavy passenger travel in the cars, in other vehicles and on foot, and as to which customs inspection service had been maintained by the United States, as well on Sundays and holidays, when the travel was heaviest, as on week days, was notified that unless it procured a special license under the above amended act, which would necessitate its agreeing to pay the amount of extra compensation for customs officials and giving a bond to indemnify the United States against all losses arising from the granting of the license, no vehicle, except the cars, would be permitted to enter the United States on Sundays and holidays, and no passengers, except after surrender of all personal baggage, including handbags, to a customs guard, and that all vehicles except the cars, and all baggage surrendered, would be held by the collector at the owner's risk for examination on the following working day. *Held:* (*a*) That the instruction of the Secretary of the Treasury to this effect could not be sustained as a discretionary determination that the movement of merchandise at the place did not justify maintaining customs service on the days in question. P. 514. (*b*) That it was not a valid regulation under Rev. Stats., § 161, but was both unreasonable and inconsistent with law, virtually laying a tax and providing for extra compensation of officials from a private source contrary to statute. P. 514. (*c*) That the bridge owner, as well as passengers and vehicle owners, had a standing to question the regulation. P. 515.

273 Fed. 153, reversed.

REVIEW of a decree of the Circuit Court of Appeals affirming the action of the District Court in dismissing, for want of equity, a bill filed by the present petitioner to restrain the respondent collector of customs from putting into effect measures affecting the customs inspection at the terminus of petitioner's toll bridge.

*Mr. Basil Robillard* for appellant and petitioner.

*Mr. Assistant Attorney General Ottinger*, with whom *Mr. Solicitor General Beck* and *Mr. Harvey B. Cox* were on the brief, for appellees and respondents.

*Mr. John W. Beaumont*, by leave of court, filed a brief as *amicus curiae*.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

The International Railway Company owns and operates two public toll-bridges across the Niagara River between the United States and Canada. One is at Niagara Falls, the other at Lewiston, a short distance below. Over each bridge the company operates regularly its passenger cars; and over each there is heavy passenger travel also in other vehicles and on foot. For more than twenty years prior to June, 1920, the Government had, at its own expense, maintained at the American end of these bridges customs inspectors, continuously day and night, including Sundays and holidays. Then the Collector of Customs of the Port of Buffalo notified the company that on Sundays and holidays thereafter no vehicle (except trolley cars) would be permitted to enter the United States; that no passenger would be allowed to enter except after surrender to the customs guard of all personal baggage, even the smallest handbag; and that all vehicles (except trolley cars) and all baggage surrendered would be held by the Collector, at the owner's risk, for examination on the next following working day. The company was further advised that continued service of customs inspectors on Sundays and holidays could be secured, if it would make application for a special license under the Act of February 13, 1911, c. 46, 36 Stat. 899, as amended by the Act of February 7, 1920, c. 61, 41 Stat. 402. Day and night customs service on ordinary week days was to be continued at the expense of the Government as thereto-

fore. The Collector acted throughout under instructions of the Secretary of the Treasury.

The Act of 1911, entitled "An Act To provide for the lading or unlading of vessels at night", etc., declares that immediate lading or unlading of any vessel or other conveyance can be had upon the obtaining by "master, owner, agent, or consignee" of a special license therefor. To obtain the license it is necessary that the applicant shall agree to pay to the Collector of Customs an amount equal to the extra compensation of the customs officers employed therefor at night or on Sundays or holidays, and shall give a bond conditioned to indemnify the United States against all losses which arise from granting the license. The compensation payable for overtime, including services on Sundays and holidays, was fixed by the Secretary of the Treasury at double the day rate; and the amount of the bond for a six months' license is fixed by the statute at fifty thousand dollars. The amendment of 1920 provides, among other things, that the work for which extra compensation is payable by the licensee shall include that of examining "passengers' baggage." The company does not unlade any cargo at night or on Sundays or holidays, and does not contemplate doing so. It is interested only in preserving the passenger traffic passing over its bridges. This traffic on working days is not nearly as heavy as on Sundays and holidays. Discontinuance of the customs service on those days would, in large measure, destroy that traffic.

The company brought this suit in the Federal District Court for Western New York against the Collector to enjoin the threatened action, insisting that the provisions of these statutes are not applicable to a toll-bridge and that the Collector is without power to exact, as a condition of continuing the service, that the company take a license with the attendant burdens. The District Court

dismissed the bill for want of equity, 271 Fed. 313; and its decree was affirmed by the Circuit Court of Appeals, 273 Fed. 153. The case was brought here by appeal; and a petition for a writ of certiorari was also filed, consideration of which was postponed until the hearing on the merits. Whether the action taken and threatened exceeds the powers conferred by law is the main question presented.

The Act of 1911 contained no reference whatsoever to passengers or to their baggage or personal effects. It dealt exclusively with the grant of special permits for the immediate lading or unlading of vessels and other conveyances. It consists of five sections and a repealing clause. The first four prescribe the conditions under which such license shall issue and the proceedings to be taken thereunder. The fifth section gives the Secretary of the Treasury power to fix extra compensation to be paid customs officials serving at night, on Sundays or on holidays in connection with lading or unlading under such special permit; and it provides that an amount equal to the extra compensation shall be paid to the Collector by the licensee. The amendatory Act of February 7, 1920, made no change whatsoever in the first four sections of the Act of 1911. It dealt solely with the extra compensation, merely substituting the new § 5, shown in the margin.[1] This

[1] In the following reprint of the new § 5 the phrases omitted from old § 5 are bracketed and are in small capitals. The new phrases are in italics. That part of the section which remained unchanged is in ordinary type.

"The Secretary of the Treasury shall fix a reasonable rate of extra compensation for [NIGHT] *overtime* services of inspectors, storekeepers, weighers, and other customs officers and employees *who may be required to remain on duty between the hours of five o'clock postmeridian and eight o'clock antemeridian, or on Sundays or holidays, to perform services* in connection with the lading or unlading of cargo [AT NIGHT], or the lading [AT NIGHT] of cargo or merchandise

substituted section defines what shall be deemed overtime, how the rate of extra pay shall be fixed, and what the work is, for which extra compensation shall be paid. In

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for transportation in bond or for exportation in bond or for [THE] exportation with benefit of drawback, *or in connection with the receiving or delivery of cargo on or from the wharf, or in connection with the unlading, receiving, or examination of passengers' baggage* [BUT SUCH RATE OF COMPENSATION SHALL NOT EXCEED AN AMOUNT EQUAL TO DOUBLE THE RATE OF COMPENSATION ALLOWED TO EACH SUCH OFFICER OR EMPLOYEE FOR LIKE SERVICES RENDERED BY DAY], *such rates to be fixed on the basis of one-half day's additional pay for each two hours or fraction thereof of at least one hour that the overtime extends beyond five o'clock postmeridian (but not to exceed two and one-half days' pay for the full period from five o'clock postmeridian to eight o'clock antemeridian), and two additional days' pay for Sunday or holiday duty.* [,] The said extra compensation *shall* [TO] be paid by the master, owner, agent, or consignee of such vessel or other conveyance whenever such special license or permit for immediate lading or unlading or for lading or unlading at night or on Sundays or holidays shall be granted to the collector of customs, who shall pay the same to the several customs officers and employees entitled thereto according to the rates fixed therefor by the Secretary of the Treasury: *Provided, That such extra compensation shall be paid if such officers or employees have been ordered to report for duty and have so reported, whether the actual lading, unlading, receiving, delivery, or examination takes place or not.* Customs officers acting as boarding officers and any customs officer who may be designated for that purpose by the collector of customs are hereby authorized to administer the oath or affirmation herein provided for, and such boarding officers shall be allowed extra compensation for services in boarding vessels at night or on Sundays or holidays at the rates prescribed by the Secretary of the Treasury as herein provided, the said extra compensation to be paid by the master, owner, agent, or consignee as such vessel[s]: *Provided further, That in those ports where customary working hours are other than those hereinabove mentioned, the Collector of Customs is vested with authority to regulate the hours of customs employees so as to agree with prevailing working hours in said ports, but nothing contained in this proviso shall be construed in any manner to affect or alter the length of a working day for customs employees or the overtime pay herein fixed.*"

this work it includes that "in connection with the unlading, receiving, or examination of passengers' baggage." The contention of the Government is that the mere insertion of these words in § 5 has the effect of establishing a system of special licenses applicable to toll-bridges which are not vessels or other conveyances, and on which there is neither cargo, lading or unlading, but passengers who pass on foot or in trolleys or automobiles.

The contention is at variance with the language of the act and with its history. Obviously the words "vessel or other conveyance" are not appropriate to describe the plant of a toll-bridge. Other provisions, also, of the Act of 1911, like the requirement of "entry of vessels, and due report of other conveyances" before issue of the special license, show that it was not the purpose of Congress to make it applicable to the conduct of a toll-bridge or the operation thereon of a line of passenger trolley cars. The clause in the amendment of 1920 by which the extra compensation payable under § 5 is extended to cover overtime "in connection with the unlading, receiving, or examination of passengers' baggage" is given full effect, if applied to the baggage of passengers on those vessels for the immediate lading and unlading of whose cargoes special license may issue under the first four sections of the Act of 1911. That these were the only overtime services in connection with passengers for which the amendment made provision is confirmed by its history. The injustice of denying to customs officials compensation for such overtime services was obvious. But the Secretary of the Treasury had been advised, after the passage of the Act of 1911, as well as before, that he was without power to make—or to require the vessel owner to make—any payment therefor, since passengers' baggage is not "cargo", 30 Ops. Atty. Gen. 123. To remedy this and other defects in the provision for extra pay, the amendment was introduced at the instance of the Treasury De-

partment, with the approval of the United States Shipping Board and of the American Steamship Association.[1]

Congress created two distinct systems for the examination of articles coming from foreign countries. One dealt with articles imported as merchandise; the other with passengers' baggage and personal effects. That distinction, established by the Act of March 2, 1799, c. 22, 1 Stat. 627, has been preserved in all later legislation. *One Pearl Chain* v. *United States*, 123 Fed. 371, 374. For merchandise there are elaborate provisions concerning entry, manifests, unloading, invoices, consular certificates and bills of lading. Revised Statutes, §§ 2581, 2867, 2962 and 2872, as amended by Act of June 26, 1884, c. 121, § 25, 23 Stat. 53, 59. There are special provisions affecting importations from Canada and Mexico. Revised Statutes, §§ 3097, 3098, 3099. Compliance with these requirements necessarily involves delays. Concerning passengers' baggage and effects the provisions are much simpler. They are designed to secure expeditious entry. Revised Statutes, §§ 2799, 2800, 2801 and 2802, deal with articles from foreign ports. There are additional provisions concerning

[1] Report of Committee on Commerce, Senate No. 306, 66th Cong., 1st sess. In presenting the report in the Senate on behalf of the Committee, Mr. Calder said: "We have had a law on the statute books for a number of years permitting the lading and unlading of vessels at night, for which the Government employees were paid in some such manner as is prescribed in this measure. But a year or two ago the Attorney General held that men could not be paid for passing upon the baggage taken off ships at night, but could be paid for supervising the discharging of the cargoes. That caused some difficulty, because we found a customs official examining baggage at night and being unpaid for it, and right alongside of him a customs official examining cargo and being paid for that." 59 Cong. Rec., Part 1, p. 640. See also 59 Cong. Rec., Part 2, pp. 2176–2178; Hearing of October 11, 1919, on Hours of Labor and Pay of Customs Inspectors on H. R. 6577, Committee on Ways and Means; Senate Report No. 660, 61st Cong., 2d sess.; House Report No. 1657, 61st Cong., 2d sess.

articles coming from contiguous countries. Revised Statutes, §§ 3100, 3101, 3102. That Congress intended by the Act of 1920 to abandon this distinction between merchandise and passengers' baggage which had been carefully preserved in the Act of 1911, is not to be assumed.

It is also insisted that the Secretary of the Treasury has authority, independently of the power specially conferred by the Act of 1911 as amended, to issue the instruction complained of. The contention is that his instruction to the Collector was not to compel the bridge company to pay the cost of the inspection service but merely to withdraw the service unless the company would agree to pay the cost; that since customs officials cannot be maintained at every point where merchandise may conceivably enter from contiguous countries, discretion must rest in the Secretary to determine whether the character and extent of the movement at a particular place justifies maintaining them there; and that the instruction given was a regulation under § 161 of the Revised Statutes which had the force of law. *Haas* v. *Henkel*, 216 U. S. 462, 480. To this contention it is perhaps a sufficient answer to say that the instruction given was obviously not a determination by the Secretary that the travel over these bridges on Sundays and holidays was not such as to justify the Government in maintaining the inspection service. The travel was heavier on those days than on any other; and the service had been maintained continuously for more than twenty years. But there are other conclusive answers. Section 161 does not confer upon the Secretary any legislative power. *Morrill* v. *Jones*, 106 U. S. 466; *United States* v. *George*, 228 U. S. 14. A regulation to be valid must be reasonable and must be consistent with law. The instruction given lacks both of these essentials. To collect the cost of customs service from vessel owners or others is virtually laying a tax upon them. This cannot be done except by specific authorization of Congress.

Moreover, unless so authorized, no official or employee may receive from the Government pay for extra services. Revised Statutes, § 1764; *United States* v. *Garlinger*, 169 U. S. 316. Nor may he receive in connection with his services pay from any private source, Act of March 3, 1917, c. 163, § 1, 39 Stat. 1106. Customs officials especially are forbidden to receive such payment. Revised Statutes, § 1790. Furthermore, to impose upon the company the obligation of furnishing an indemnity bond covering losses which may accrue to the Government from the action, not of the bridge company or of its employees, but of any passenger who crosses the bridge was clearly unreasonable. It was this lack of power in the Secretary to impose upon others any part of the cost of the customs service unless specially authorized by Congress which led to the enactment also of the earlier legislation concerning special licenses for lading and unlading of cargoes.[1] The instructions here attacked profess to rest, not upon Revised Statutes, § 161, but upon the Act of 1911 as amended by that of 1920, T. D. 38290; T. D. 38429. The claim of such authority by virtue of the power to establish regulations for the Department was apparently first made in this suit.

It is further contended that the petitioner has no standing to question the regulation which applies not to it, but to the owners of private conveyances and of personal baggage brought over the bridge. While these also might be entitled to seek redress, it is clear that the instructions given threaten vital interests of the bridge company to which a court of equity should afford protection. The

[1] See Act of March 3, 1873, c. 240, 17 Stat. 579; Revised Statutes, §§ 2871, 2872; Acts of June 26, 1884, c. 121, § 25, 23 Stat. 53, 59; June 5, 1894, c. 92, 28 Stat. 85; May 31, 1900, c. 600, 31 Stat. 249; December 16, 1902, c. 2, 32 Stat. 753; June 30, 1906, c. 3909, 34 Stat. 633. See also T. D. 28214, in re Act of 1906; T. D. 31562, in re Act of 1911.

jurisdiction of this court on appeal was also questioned. In support of the jurisdiction it is urged that the bill invoked rights under the Constitution as well as under the revenue laws; and treaty rights are also pressed upon us; *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397, 407; *Merriam Co.* v. *Syndicate Publishing Co.*, 237 U. S. 618, 621. Whether the appeal lies we need not decide. A writ of certiorari was also applied for and the question presented is of sufficient importance to require determination by this court. *Montana Mining Co.* v. *St. Louis Mining Co.*, 204 U. S. 204, 213.

*Decree reversed.*